No. 16-1177

Title:	Virginia, et al., Petitioners v. Dennis LeBlanc
Docketed:	March 30, 2017
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Numbers:	(15-7151)
Decision Date:	November 10, 2016
Rehearing Denied:	January 20, 2017

DATE	PROCEEDINGS AND ORDERS
Mar 28 2017	Petition for a writ of certiorari filed. (Response due May 1, 2017)
May 01 2017	Brief of respondent Dennis LeBlanc in opposition filed.
May 01 2017	Motion for leave to proceed in forma pauperis filed by respondent Dennis LeBlanc.
May 05 2017	Reply of petitioners Virginia, et al. filed.
May 08 2017	Letter of May 4, 2017, from counsel for petitioners waiving the 14-day waiting period for the distribution of the petition pursuant to Rule 15.5 received.
May 09 2017	DISTRIBUTED for Conference of May 25, 2017.
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Jun 12 2017	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Jun 12 2017	Petition GRANTED. Judgment REVERSED. Opinion per curiam. (Detached Opinion). Justice Ginsburg, concurring in the judgment. (Detached Opinion).
Jul 05 2017	Petition for Rehearing filed.
Jul 13 2017	DISTRIBUTED.
Aug 07 2017	Rehearing DENIED.
Aug 07 2017	JUDGMENT ISSUED.

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In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA AND
RANDALL MATHENA, CHIEF WARDEN,
RED ONION STATE PRISON,

Petitioners,

v.

DENNIS LEBLANC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held in *Graham v. Florida* that the Eighth Amendment forbids life-without-parole sentences for juvenile nonhomicide offenders. 560 U.S. 48, 82 (2010). The Supreme Court of Virginia held in *Angel v. Commonwealth* that Virginia's sentencing laws comply with *Graham* because juvenile nonhomicide offenders are eligible for conditional release at age 60 based on normal parole considerations. 704 S.E.2d 386, 402 (Va. 2011). The question presented is:

Whether the Fourth Circuit erred under AEDPA in holding that the Virginia Supreme Court's decision in *Angel v. Commonwealth* was an objectively unreasonable application of *Graham v. Florida*, thereby creating a split with Virginia courts over the validity of Virginia's parole regulations, and a split with other jurisdictions over whether parole eligibility at age 60 constitutes a life-without-parole sentence.

PARTIES TO THE PROCEEDING

The petitioners are the Commonwealth of Virginia and Randall Mathena, Chief Warden, Red Onion State Prison. The respondent is Dennis LeBlanc, an inmate in Warden Mathena's custody at Red Onion State Prison.

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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA AND RANDALL MATHENA, CHIEF WARDEN, RED ONION STATE PRISON, PETITIONERS,

v.

DENNIS LEBLANC, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Fourth Circuit (App. 1a) is reported at 841 F.3d 256. The opinion of the district court (App. 94a) is not reported but is available at 2015 WL 4042175. The report and recommendation of the magistrate judge (App. 67a) is not reported but is available at 2013 WL 10799406.

JURISDICTION

The Fourth Circuit rendered its opinion on November 7, 2016 and issued an amended opinion on November 10, 2016. Petitioners filed a timely petition for rehearing *en banc*, which the Fourth Circuit denied on January 20, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 et seq.), provides in part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

Virginia Code § 53.1-40.01 (2013) provides:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

The regulation of the Virginia Parole Board, entitled Conditional Release of Geriatric Inmates, No. 1.226, is reprinted at App. 142a.

Relevant portions of the Policy Manual of the Virginia Parole Board are reprinted at App. 147a.

INTRODUCTION

This Court held in 2010 in *Graham v. Florida* that the Eighth Amendment forbids life-without-parole sentences for juvenile nonhomicide offenders.[1] In 2011, the Supreme Court of Virginia held in *Angel v. Commonwealth* that Virginia's sentencing laws comply with *Graham* because such offenders are eligible for

[1] 560 U.S. 48, 82 (2010).

release at age 60, based on normal parole considerations, under Virginia's conditional-release statute.[2] This Court denied certiorari on direct review in *Angel*.[3] It also denied certiorari last December in *Vasquez v. Virginia*, another case seeking direct review on the same question by serious juvenile offenders who are also eligible for conditional release at age 60.[4]

In its sharply divided opinion below, the Fourth Circuit held on federal habeas review that Virginia's conditional-release program violates *Graham* because, according to the majority, the Virginia Supreme Court in *Angel* misread and misinterpreted Virginia's conditional-release regulations. Under the majority's de novo reading, the regulations do not clearly account for the offender's age at the time of the offense; make the consideration of maturity and rehabilitation permissive, not mandatory; and fail to ensure a probability that the offender will actually be paroled. The majority further concluded that postponing eligibility until age 60 violates *Graham*.

In a strongly worded dissent, Judge Niemeyer criticized the majority for paying only "lip service" to the deference that AEDPA requires to State-court adjudications, for failing to defer to the Virginia Supreme Court's authoritative interpretation of Virginia's

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[2] 704 S.E.2d 386, 402 (Va. 2011). *See* Va. Code Ann. § 53.1-40.01 (2013).

[3] *Angel v. Virginia*, 565 U.S. 920 (2011).

[4] 137 S. Ct. 568 (2016).

parole regulations, and for improperly extending *Graham*. Judge Niemeyer found that Virginia's regulations clearly encompassed consideration of the relevant factors. He also rejected the majority's conclusion that *Graham* "clearly established" that States must ensure a probability of actual release, as well as the majority's conclusion that States cannot postpone parole eligibility until age 60. He found that *Angel* was not an "unreasonable application" of *Graham* under 28 U.S.C. § 2254(d)(1).

The Fourth Circuit's decision disrupts Virginia's criminal justice system. Although the decision binds federal habeas courts in Virginia, it does not bind the Supreme Court of Virginia or Virginia State courts, which remain bound by *Angel*. Scores of Virginia offenders may seek resentencing under the Fourth Circuit's decision. And in new criminal sentencings, Virginia trial judges cannot know if a lengthy sentence that is constitutional under *Angel* will be invalidated by a federal habeas court bound by *LeBlanc*.

What is more, the Fourth Circuit's ruling has created a split with the Sixth and Ninth Circuits, and with the Supreme Courts of Virginia, Nebraska, and Louisiana, over whether postponing parole eligibility for juvenile offenders until age 60 violates the Eighth Amendment.

Because the Fourth Circuit's decision to radically extend *Graham* so plainly violates § 2254(d)(1) of

AEDPA—wreaking legal havoc in Virginia and dividing the circuits and the States—Virginia urges this Court to grant certiorari and to summarily reverse.

STATEMENT OF THE CASE

1. On July 6, 1999, between 10 and 11 o'clock in the morning, the 62-year-old victim was walking home from the grocery store in Virginia Beach when LeBlanc attacked her from behind. LeBlanc knocked her down, dragged her to some nearby bushes, pulled down her pants and underwear, and raped her. The victim suffered multiple tears at the base of her vagina and on her vaginal vault. When he was done, LeBlanc told her to stay there for 15 minutes or he would hurt her. He then stole her purse. In addition to enduring the rape and robbery, the victim suffered an injury to her right knee, causing her to walk with a limp.[5]

LeBlanc was 16 years old at the time of his crimes.[6] The victim did not get a good look at him because he stayed behind her during the attack, but DNA testing later matched LeBlanc to the sperm sample collected from the victim's vagina.[7]

On September 17, 2001, LeBlanc was charged in the Virginia Beach Juvenile & Domestic Relations District Court with rape and abduction with intent to

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[5] App. 40a; 4th-Cir.-JA 124-25.

[6] App. 3a.

[7] 4th-Cir.-JA 125.

defile and transferred to the Virginia Beach Circuit Court for prosecution as an adult. Represented by counsel, LeBlanc pleaded not guilty and waived his right to a jury trial. On July 17, 2002, after a bench trial, the circuit court found LeBlanc guilty of both felonies.[8]

On March 6, 2003, after considering the presentence report, the trial court sentenced LeBlanc to life in prison on both convictions. LeBlanc was more than 20 years old by the time of his sentencing. His prior criminal record included carjacking, abduction, robbery in Chesapeake, three counts of robbery in Virginia Beach, and multiple counts of using a firearm in the commission of a felony. LeBlanc did not appeal.[9]

Although Virginia abolished traditional parole in 1994 for felonies committed after that year,[10] the same law created Virginia Code § 53.1-40.01, which provides eligibility for conditional release for persons who reach the age of 60 and who have served at least 10 years of their sentence.[11] The conditional-release regulations provide that "[a]ll factors in the parole consideration process . . . shall apply in the determination of Conditional Release."[12] Although there is no formal legislative history for the 1994 amendments, a former chair

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[8] 4th-Cir.-JA 105-10.

[9] 4th-Cir.-JA 111, 124, 155.

[10] *See* 1994 Va. Acts Spec. Sess. II chs. 1, 2 (codified at Va. Code Ann. § 53.1-165.1 (2013)).

[11] *Id.* (codified at Va. Code Ann. § 53.1-40.01 (2013)).

[12] App. 144a.

of the Virginia Parole Board explained in 2010 that conditional release "was really focused on people who were going to get very long sentences at a young age so they would have some opportunity to be released."[13]

Virginia has consistently maintained that LeBlanc, who is currently 34 years old, is eligible for conditional release based on normal parole considerations when he turns 60.

2. In 2010, this Court held in *Graham v. Florida* that the Eighth Amendment forbids life-without-parole sentences for juveniles convicted of nonhomicide offenses.[14] The Court explained that:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, in the first instance, to explore the means and mechanisms for compliance. It bears emphasis, however, that while the Eighth Amendment prohibits a State from imposing a life without parole sentence on a juvenile nonhomicide offender, it does not require the State to release that offender during his natural life.[15]

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[13] 4th-Cir.-JA 344 [LeBlanc's Ex. 8].

[14] 560 U.S. at 82.

[15] *Id.* at 75.

In 2011, the Supreme Court of Virginia held in *Angel v. Commonwealth* that Virginia complies with *Graham* because it does not impose life-without-parole sentences on juvenile nonhomicide offenders. Rather, Virginia Code § 53.1-40.01 provides eligibility for conditional release at age 60, and "the factors used in the normal parole consideration process apply to conditional release decisions under this statute."[16] This Court denied Angel's petition for a writ of certiorari.[17] Angel's second question presented specifically asked whether Virginia's conditional-release statute complied with *Graham*.[18]

3. On May 11, 2011, LeBlanc moved the Virginia Beach Circuit Court to vacate his sentence as invalid under *Graham*.[19] LeBlanc's petition acknowledged that he was eligible for conditional release at age 60 but he argued that conditional release constituted only "a remote possibility of release" that does not satisfy *Graham*.[20] LeBlanc acknowledged the contrary ruling by the Supreme Court of Virginia in *Angel*.[21] On August 9, 2011, the circuit court conducted an evidentiary hearing at which LeBlanc introduced nine exhibits.[22]

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[16] 704 S.E.2d at 402.

[17] 565 U.S. 920.

[18] Pet. for Writ of Cert. at i, *Angel v. Virginia*, 565 U.S. 920 (2011) (No. 11-5730).

[19] 4th-Cir.-JA 112.

[20] *Id.* at 116.

[21] *Id.*

[22] *Id.* at 133-59, 168-349.

The circuit court determined that the "Supreme Court of Virginia has already looked at this issue in the *Angel* case and determined that there was an appropriate mechanism in place . . . for a defendant to receive some form of parole as enunciated in the U.S. Supreme Court case."[23] The court further found that "there is an appropriate mechanism in place" for LeBlanc.[24]

On April 13, 2012, the Supreme Court of Virginia summarily denied LeBlanc's petition for appeal, finding "no reversible error in the judgment complained of."[25]

4. On June 19, 2012, LeBlanc filed his federal habeas petition. He argued that *Angel* was wrongly decided and that his allegedly "remote possibility of release" under Code § 53.1-40.01 failed to comply with *Graham*.[26]

The magistrate judge recommended dismissing LeBlanc's petition.[27] He explained that the evidence adduced by LeBlanc in the State-court proceeding showed that Virginia's use of conditional release was the functional equivalent of parole.[28] Although the regulations required inmates to offer a "compelling

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[23] App. 63a.

[24] *Id.*

[25] App. 66a.

[26] 4th-Cir.-JA 13.

[27] App. 67a-68a.

[28] App. 83a-87a.

reason" for release, "nothing prevents the applicant from asserting as a 'compelling reason' . . . that the offense for which he was convicted . . . was committed when he was a juvenile."[29]

The magistrate judge added that "'[a]ll factors in the parole consideration process' apply in the determination of geriatric release."[30] Thus, the Board considers "such factors as the nature of the crime, age and medical condition, length of sentence received, time served, criminal record, institutional record, family and community support, and victim input."[31] "[T]he Board is guided by, *inter alia*, the applicant's 'history,' the 'facts and circumstances of the offense,' and 'mitigating and aggravating factors,' all of which may account for the age of the applicant at the time he offended."[32] Accordingly, the magistrate judge rejected LeBlanc's assertion that the Board could not consider the offender's youth at the time of the offense, finding instead from the regulations themselves that "nothing precludes the Board from granting conditional release on the basis that the applicant was a juvenile at the time he offended."[33]

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[29] App. 87a-88a.

[30] App. 88a (quoting Va. Parole Bd., Conditional Release of Geriatric Inmates [LeBlanc's Ex. 6], at App. 144a).

[31] App. 87a (quoting Va. Parole Bd., Agency Strategic Plan [LeBlanc's Ex. 4], at 4th-Cir.-JA 274).

[32] App. 88a (quoting Va. Parole Bd., Policy Manual [LeBlanc's Ex. 7], at App. 152a-153a).

[33] *Id.*

The magistrate judge also rejected LeBlanc's claim that certain release statistics showed that the conditional-release program provided no meaningful parole opportunity.[34] LeBlanc relied on statistics for four years showing, on average, that 5.8% of the inmates who applied for conditional release received it.[35] But the magistrate judge explained that those figures were depressed by the fact that persons convicted of offenses before 1995 are eligible for both conditional release and traditional parole, but they typically pursue only parole. Moreover, juvenile offenders convicted of offenses after 1994, and who are therefore not eligible for traditional parole, will not be eligible for conditional release until approximately 2038. Thus, the data did not accurately reflect the release opportunities for juvenile offenders like LeBlanc.[36]

The district court rejected the magistrate judge's recommendations and granted habeas relief, ordering that LeBlanc be resentenced to something less than life without parole.[37] The district judge held that the State court's decision was "both contrary to and an unreasonable application of . . . *Graham*."[38] Although recognizing that AEDPA requires "deference to the state

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[34] App. 82a-87a.

[35] 4th-Cir.-JA 236 (data for 2004 (5%), 2007 (3.8%), 2008 (8.2%), and 2010 (6.2%)).

[36] App. 85a-86a.

[37] App. 135a-138a.

[38] App. 135a.

court's decision,"[39] the district court found that decision contrary to clearly established federal law because it "upholds a sentence of life without parole for a juvenile nonhomicide offender."[40] The court held further that the State court's decision was "an unreasonable application" of clearly established federal law.[41] The court said that "'[e]ven the most skilled legal contortionist could not interpret [the trial court's decision] in a way that sensibly comports with the Supreme Court's crystalline pronouncements' in *Graham*,"[42] and "[t]here is no possibility that fair-minded jurists could disagree that the state court's decision conflicts with the dictates of *Graham*."[43]

5. A divided panel of the Fourth Circuit affirmed.[44] In a published opinion by Judge Wynn, joined by District Judge Johnston, sitting by designation, the majority concluded that *Angel* was not "contrary to" *Graham* within the meaning of § 2254(d)(1) because the Supreme Court of Virginia had "repeatedly stated that *Graham* requires that juvenile offenders be afforded an opportunity for 'release based on maturity and rehabilitation,'" and "[l]ikewise, the *Angel* court acknowledged that the opportunity for release must be

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[39] App. 110a.

[40] App. 114a.

[41] App. 118a.

[42] App. 134a (quoting *United States v. Hashime*, 722 F.3d 572, 574 (4th Cir. 2013)).

[43] *Id.*

[44] App. 1a.

'meaningful.'"[45] But the majority found that *Angel* was an "objectively unreasonable" application of *Graham*, in violation of § 2254(d)(1).[46] The majority gave three reasons.

First, the majority read the conditional-release regulations to permit the Virginia Parole Board to deny an application for conditional release for any reason whatsoever at an "Initial Review" stage, without considering the normal parole factors that apply during the "Assessment Review" stage.[47] But *Angel* drew no such distinction, and Judge Niemeyer wrote in dissent that "the majority relies simply on its expressed disagreement with the Virginia Supreme Court's decision in *Angel* . . . and effectively overrules it."[48] He emphasized that the Supreme Court of Virginia is "the ultimate authority on Virginia law" and reasonably interpreted the regulations to provide that "the factors used in the normal parole consideration process apply to conditional release decisions under this statute."[49] The majority rejected that argument, however, concluding that *Angel* had failed to draw a distinction between the two stages of review and that the Virginia Supreme Court's interpretation conflicted with the

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[45] App. 21a-22a (quoting *Angel*, 704 S.E.2d at 402).

[46] App. 23a.

[47] App. 23a-24a.

[48] App. 36a-37a.

[49] App. 47a.

"plain language" of the conditional-release regulations.[50]

Second, the panel majority read the Virginia Supreme Court's decision in *Angel* to have "expected" that Angel would spend the rest of his life in prison, notwithstanding the availability of conditional release,[51] and the majority interpreted that expectation to conflict with language in *Solem v. Helm* that "'parole' should be the 'normal expectation in the vast majority of cases.'"[52] In dissent, Judge Niemeyer said that "[t]his ground for attacking the Virginia Supreme Court can rest only on wild speculation, as no juvenile offender has yet been processed under the State's geriatric release program, and the majority has pointed to no data to predict how the Parole Board will decide applications of juveniles for early release when they first qualify."[53] Judge Niemeyer also disagreed with the majority's conclusion that *Graham* required a probability of parole, noting that it required only a meaningful opportunity to obtain parole, not "that juveniles be released at any given time."[54]

Third, the panel majority concluded that the "prisoner's youth at the time of his offense is not among" the decision factors listed in the parole guidelines, contrary to *Graham*'s requirement to consider the "special

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[50] App. 25a.

[51] App. 28a-29a.

[52] App. 29a (quoting *Solem v. Helm*, 463 U.S. 277, 300 (1983)).

[53] App. 58a.

[54] *Id.*

mitigating force of youth."[55] "More significantly," the majority added, postponing parole eligibility until age 60 treated juvenile offenders "worse" than adult offenders "because juvenile offenders 'must serve a larger percentage of their sentence than adults do before eligibility to apply for geriatric release.' "[56]

Judge Niemeyer wrote that the majority was "demonstrably mistaken" that the parole regulations did not account for the offender's youth at the time of the offense, noting that it was covered by such considerations as the applicant's "history," the "[f]acts and circumstances of the offense," and "mitigating . . . factors."[57] He also rejected the majority's conclusion that parole eligibility at age 60 comes too late to satisfy *Graham*:

> It is a reality that a person who commits a serious crime at age 35 or, indeed, as a juvenile, will have the possibility of serving more years in prison than a person who commits the same crime at age 62. But if that reality violates *Graham*, it is hard to see how any term-of-years sentence for a juvenile could withstand Eighth Amendment scrutiny; a young person's chances of serving a full sentence are inherently higher than an older person's.[58]

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[55] App. 31a (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988)).

[56] *Id.* (quoting *LeBlanc v. Mathena*, No. 2:12cv340, 2015 WL 4042175, at *14 (E.D. Va. July 1, 2015)).

[57] App. 53a, 56a.

[58] App. 58a.

Judge Niemeyer observed that "the majority unfortunately fails to respect, in any meaningful way, the deference Congress requires federal courts to give to state court decisions on post-conviction review under § 2254."[59] He said the majority "fails to recognize that our task on a § 2254 habeas petition is not to evaluate state parole systems *de novo* but rather to determine whether the Virginia Supreme Court's evaluation of its own program was an unreasonable application of *Graham*, *see* 28 U.S.C. § 2254(d)(1), which it clearly was not."[60] He thought that "it strains credulity to conclude that the [State] Court's application of *Graham* was 'so lacking in justification' that it fell 'beyond any possibility for fairminded disagreement.'"[61]

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's failure to give the required deference under AEDPA has created an intolerable split with the Supreme Court of Virginia that disrupts Virginia's criminal justice system.

"It is important at the outset to define the question before us."[62] That question emphatically is *not* whether

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[59] App. 38a.

[60] App. 39a.

[61] App. 48a (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

[62] *Renico v. Lett*, 559 U.S. 766, 772 (2010).

Virginia's conditional-release statute satisfies *Graham*. "The question under AEDPA is instead whether the determination" by the State court that Virginia's conditional-release statute satisfies *Graham* "was 'an unreasonable application of . . . clearly established Federal law.'"[63]

This Court has repeatedly emphasized that AEDPA's deferential standard "is *intentionally* 'difficult to meet.'"[64] An "unreasonable application" of Supreme Court precedent under § 2254(d)(1) "'must be objectively unreasonable, not merely wrong; even clear error will not suffice.'"[65] The State judgment must be "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'"[66] And "where the 'precise contours' of [a] right remain 'unclear,' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims."[67]

Although the Fourth Circuit purported to apply AEDPA's deferential standard, in reality the court made its own determination that conditional release is not a good enough form of parole, and it did so by dramatically extending *Graham* and by disregarding the

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[63] *Id.* at 773 (quoting 28 U.S.C. § 2254(d)(1)).

[64] *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)) (emphasis added).

[65] *Id.* (quoting *White*, 134 S. Ct. at 1702).

[66] *Id.* (quoting *Harrington*, 562 U.S. at 103).

[67] *Id.* at 1377 (quoting *White*, 134 S. Ct. at 1705).

Virginia Supreme Court's controlling interpretation of Virginia's parole regulations. As shown below, Judge Niemeyer was correct when he said that "the majority, in its adventuresome opinion, pays only lip service to the required standards of review."[68]

A. The Fourth Circuit misapplied AEDPA by failing to defer to the Virginia Supreme Court's binding interpretation of Virginia's parole regulations and by extending *Graham* beyond its holding.

The Fourth Circuit concluded that *Angel* was not "contrary to" *Graham* yet, paradoxically, that *Angel* was an "unreasonable application" of *Graham*.[69] The court committed reversible error at each step of its "unreasonable application" analysis.

First, as Judge Niemeyer correctly pointed out in dissent, the Supreme Court of Virginia is "the ultimate authority on Virginia law,"[70] so the majority was required to defer to *Angel*'s holding that "if the prisoner meets the qualifications for consideration contained in the [conditional-release] statute, *the factors used in the normal parole consideration process apply to conditional release decisions under this statute*."[71] The Fourth Circuit improperly second-guessed that State-law judgment. In *Estelle v. McGuire*, this Court

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[68] App. 59a.

[69] App. 21a-23a.

[70] App. 47a.

[71] 704 S.E.2d at 402 (emphasis added).

"reemphasize[d] that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."[72] And in *Bradshaw v. Richey*, the Court again said that a State court's interpretation of State law "binds a federal court sitting in habeas corpus."[73] The Fourth Circuit simply disregarded that crystal-clear directive. As the Tenth Circuit bluntly put it, "[m]atters of state law are theirs, not ours, to answer."[74]

The panel instead parsed Virginia's conditional-release regulation itself to distinguish between the "Initial Review Stage" and the "Assessment Review Stage," reasoning that the Virginia Supreme Court overlooked that distinction and that the proper interpretation of the text remained "an unsettled issue of state law."[75] The panel then reasoned that it would be an "absurd" reading to conclude that normal parole considerations also apply at the Initial Review Stage.[76]

The Fourth Circuit's judgment was inappropriate in light of *Angel*, and in light of other statements by the Supreme Court of Virginia that Virginia's conditional-release program is "akin to parole" and provides

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[72] 502 U.S. 62, 67-68 (1991).

[73] 546 U.S. 74, 76 (2005).

[74] *Grant v. Trammell*, 727 F.3d 1006, 1013 (10th Cir. 2013) (Gorsuch, J.), *cert. denied*, 134 S. Ct. 2731 (2014).

[75] App. 25a.

[76] App. 25a-26a.

a meaningful opportunity for release based on maturity and rehabilitation.[77] Moreover, the Fourth Circuit's decision improperly intruded on the prerogative of the Supreme Court of Virginia to provide a limiting construction of the parole regulations to the extent a narrowing construction was needed to save them from constitutional invalidity.[78]

Furthermore, in answering a State-law question that the panel said was unsettled, the court failed to heed this Court's admonition in *Arizonans for Official English* that federal courts strongly consider certifying

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[77] *Johnson v. Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016). One senior Justice in *Johnson* dissented from that view, citing the panel ruling in *LeBlanc* below. *Id.* at 335 (Millette, S.J., dissenting). But none of the other Justices agreed with him. *See also Vasquez v. Commonwealth*, 781 S.E.2d 920, 924 n.3 (Va.) (noting that conditional release provides "'the normal parole consideration process' to all convicts [including the juvenile offenders there] once they reach the age of sixty") (quoting *Angel*, 704 S.E.2d at 402), *cert. denied*, 137 S. Ct. 568 (2016); *id.* at 931 (Mims, J., joined by Goodwyn, J.) (concurring on ground that *Angel* "held that Virginia's conditional release statute provides the requisite meaningful opportunity for release based on demonstrated maturity and rehabilitation that *Graham* requires").

[78] *See, e.g.*, *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) ("Only the [State] courts can supply the requisite [narrowing] construction, since of course '[federal courts] lack jurisdiction authoritatively to construe state legislation.'") (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971)); *Toghill v. Commonwealth*, 768 S.E.2d 674, 681-82 (Va. 2015) (applying limiting construction to Virginia's sodomy statute to uphold its validity as applied to crimes against children but prohibit its application to consensual conduct protected by *Lawrence v. Texas*, 539 U.S. 558 (2003)).

unsettled questions to the State's highest court.[79] Certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."[80] More importantly, "respect for the place of the States in our federal system calls for close consideration" of certifying such questions.[81]

The Fourth Circuit disregarded that important federalism concern. After the court announced its decision, Virginia moved unsuccessfully for rehearing *en banc*, explaining not only that the panel's State-law ruling conflicted with *Angel* and *Estelle*, but that an "unsettled" question, if one existed, should have been certified to the Virginia Supreme Court.[82] Indeed, *Lehman Brothers v. Schein* involved a similar situation in which the Second Circuit declined a petition for rehearing that requested that the unsettled State-law question there be certified to Florida's Supreme Court.[83] This Court vacated the judgment and remanded the case for the Second Circuit to reconsider

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[79] *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). *See* Va. R. Sup. Ct. 5:40 (Certification Procedures).

[80] *Arizonans*, 520 U.S. at 76.

[81] *Id.* at 75.

[82] Pet. for Reh'g *En Banc* at 14, *LeBlanc v. Mathena*, 841 F.3d 256 (4th Cir. 2016) (No. 15-7151), ECF No. 51.

[83] 416 U.S. 386, 391 (1974); *id.* at 392-93 (Rehnquist, J., concurring) (noting that petitioners did not request certification until their rehearing petition).

certification.[84] The Court said that while certification is not "obligatory[,] [i]t does . . . in the long run save time, energy, and resources and helps build a cooperative judicial federalism."[85] At a minimum, the Fourth Circuit, like the Second Circuit in *Lehman Brothers*, erred in overlooking certification.

Second, after failing to defer to *Angel*, the Fourth Circuit then compounded its mistake by erroneously determining that Virginia's parole considerations do not include the "prisoner's youth at the time of his offense."[86] That was plainly wrong. As the magistrate judge and Judge Niemeyer both found, the offender's youth at the time of the offense is covered by specific factors in the parole manual, including the applicant's "history," the "facts and circumstances of the offense," and "mitigating . . . factors" of the offense.[87] The Fourth Circuit panel was less clear about whether it believed that "maturity and rehabilitation" were encompassed by the parole factors.[88] But those considerations are

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[84] *Id.* at 391-92.

[85] *Id.* "After remand, the Second Circuit certified questions to the Florida Supreme Court, that court disagreed with the panel majority's prediction of Florida law, and the Second Circuit acted accordingly." Bryan A. Garner et al., *The Law of Judicial Precedent* 625 (2016) (footnotes omitted).

[86] App. 31a.

[87] App. 51-52a (Niemeyer, J.), 88a (Leonard, M.J.).

[88] *See* App. 23a (stating that majority "[a]ssum[ed] *arguendo* the 'decision factors' used in the normal parole consideration process adequately account for a juvenile offender's 'maturity and rehabilitation' ").

clearly covered by the offender's "history," "institutional experience," "response to available programs," "academic achievement," "vocational, education, training or work assignments," "general adjustment," as well as his "changes in motivation and behavior," such as "changes in attitude toward self and others."[89]

As Judge Niemeyer put it, "Saying that these factors do not account for maturity and rehabilitation [flouts] reason."[90] It also disregards *Angel* and a later concurrence by Virginia Justices Mims and Goodwyn, in *Vasquez*, that "[t]hese considerations certainly allow the Board to consider age, maturity and rehabilitation as *Graham* instructs."[91]

Third, the panel erred under AEDPA in concluding that a State's parole regulations are defective under *Graham* unless they make the consideration of "maturity and rehabilitation" mandatory, rather than discretionary. The panel said that:

> For purposes of *Graham*, the key issue is not whether the Parole Board is "*able*" to consider a juvenile offender's rehabilitation and maturity—it is whether the Parole Board *must* consider rehabilitation and maturation.[92]

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[89] App. 152a-155a.

[90] App. 54a.

[91] 781 S.E.2d at 934-95.

[92] App. 30a n.10 (emphasis added).

To be clear, Virginia reads *Angel* as *mandating* that the Virginia Parole Board apply "normal parole consideration[s]" at *all* stages of review for conditional release, including those considerations covering the offender's youth at the time of the offense and his maturity and rehabilitation while incarcerated.[93] But even if such consideration were discretionary, it would not be "an unreasonable application of" *Graham* under § 2254(d)(1) for a State court to conclude that such a system provided the parole opportunity that *Graham* requires. *Graham* simply did not address the mandatory/discretionary distinction.

Graham said that if a State "imposes a sentence of life it must provide [a juvenile offender] with some realistic *opportunity* to obtain release before the end of that term."[94] This Court expressly left it to "the State[s], in the first instance, to explore the means and mechanisms for compliance."[95] To suggest that *Graham* mandated specific procedures runs contrary to that open-ended delegation. Before *Graham*, this Court had held that parole procedures "may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority."[96] Justice Thomas's dissent in *Graham* noted that the Court had not provided much guidance about what additional procedures might be needed: "what,

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[93] 704 S.E.2d at 402.

[94] 560 U.S. at 82 (emphasis added).

[95] *Id.* at 75.

[96] *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979).

exactly, does such a 'meaningful' opportunity entail? When must it occur? And what Eighth Amendment principles will govern review by the parole boards the Court now demands that States empanel? The Court provides no answers to these questions, which will no doubt embroil the courts for years."[97]

Until such guidance is provided, a State court could reasonably apply *Graham* by concluding that a parole system satisfies the Eighth Amendment when it permits, but does not mandate, consideration of the offender's maturity and rehabilitation. That is a classic application of this Court's AEDPA jurisprudence: "where the 'precise contours' of [a] right remain 'unclear,' state courts enjoy 'broad discretion' in their adjudication of a prisoner's claims."[98]

Fourth, the panel erred in reading *Graham* to require that States ensure a *probability* of release, rather than, as *Graham* put it, "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[99] *Graham* emphasized that "[a] State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."[100] Indeed, nothing in *Graham* suggested that a "meaningful" or "realistic"

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[97] 560 U.S. at 123 (Thomas, J., dissenting).

[98] *Woods*, 135 S. Ct. at 1377 (quoting *Woodall*, 134 S. Ct. at 1705).

[99] 560 U.S. at 75.

[100] *Id.* at 82.

"opportunity" for release means a *probability* of release. Chief Justice Roberts asked Graham's counsel at oral argument, "what if . . . the usual State parole system . . . grants parole to 1 out of 20 applicants?" Counsel responded, "I think that would be sufficient. All that would have to be required is a meaningful opportunity to the adolescent offender to demonstrate that he has in fact changed, reformed, and is now fit to live in society . . . . That's all we are asking for."[101] And even though, as the magistrate judge found, the current conditional-release statistics understate the actual probability of release, the average 5.8% release rate is higher than the 5% rate ("1 out of 20") in the Chief Justice's question.[102]

"[C]learly established Federal law" under § 2254(d)(1) means "only the holdings, as opposed to the dicta, of this Court's decisions,"[103] and there is nothing in the holding of *Graham* (or even its dicta) to support the Fourth Circuit's conclusion that parole laws are constitutionally defective if they do not ensure a *probability* of release. The Fourth Circuit did not even cite *Graham* for that proposition, but rather

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[101] Tr. of Oral Arg. at 7:4-14, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-7412.pdf.

[102] *See supra* notes 34-35.

[103] *Woods*, 135 S. Ct. at 1376 (quoting *Woodall*, 134 S. Ct. at 1702).

Solem's statement that "[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases."[104] But that language likewise was dictum.[105]

In fact, this Court has never held that a parole system is constitutionally defective if it fails to ensure a probability of release. To the contrary, *Swarthout* and *Greenholtz rejected* any claim that the federal Constitution creates a right to be paroled before the end of a valid sentence.[106] Reading either *Solem* or *Graham* to require a probability of release would at least partially overrule those cases. And if a habeas court must extend a rationale of a precedent "before it can apply to the facts at hand,' then by definition the rationale was not 'clearly established at the time of the state-court decision.' "[107]

Finally, the Fourth Circuit was wrong to read *Graham* to foreclose a parole system that postpones eligibility until age 60. There is literally nothing in *Graham*—not even dictum—to support such a leap. Graham's counsel conceded on brief, and again at oral argument, that it would likely be constitutional—and

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[104] App. 18a-19a (quoting *Solem*, 463 U.S. at 300).

[105] *See Solem*, 463 U.S. at 303.

[106] *Swarthout v. Cooke*, 562 U.S. 216, 220 (2011) (per curiam) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence."); *Greenholtz*, 442 U.S. at 7 (same); *see also id.* at 11 (accepting that "the *possibility* of parole provides no more than a mere hope that the benefit will be obtained").

[107] *Woodall*, 134 S. Ct. at 1706 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004)).

not a life-without-parole sentence—for a State to require the juvenile offender to serve *40 years* before being eligible for parole.[108] Justice Alito noted that concession in his dissent.[109] The majority opinion also left open whether release after a "half century" would be constitutionally adequate.[110] Virginia's life-expectancy tables reflect that a 34-year-old person (LeBlanc's current age) has a life expectancy of another 45.1 years—until age 78.[111] Accordingly, nothing in *Graham* prevents a State from reasonably concluding that parole eligibility at age 60 provides a sufficient opportunity for release before the end of life.

To claim otherwise, the Fourth Circuit cited the "especially harsh" phrase from the following passage in *Graham*,[112] but when read in context, this Court was

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[108] Reply Br. at 17, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412); Tr. of Oral Arg. at 6:16-7:3, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412).

[109] 560 U.S. at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole. Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole 'probably' would be constitutional.").

[110] 560 U.S. at 79 (noting the unfairness of imposing a life-without-parole sentence on a juvenile nonhomicide offender, "even if he spends *the next half century* attempting to atone for his crimes and learn from his mistakes") (emphasis added).

[111] *See* Va. Code Ann. § 8.01-419 (2015); *accord* U.S. Census Bureau, *Statistical Abstract of the United States, Table 105—Life Expectancy by Sex, Age, and Race: 2008* (2012), https://www.census.gov/prod/2011pubs/12statab/vitstat.pdf (projecting 44.7 years remaining for 35-year-old person).

[112] App. 31a.

obviously talking about why life-without-parole is "especially harsh" on juveniles, not about *when* parole eligibility must occur:

> Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.[113]

Nothing in that passage requires a State court to conclude that parole eligibility at age 60 comes too late to satisfy *Graham*. Nor does *Graham* illuminate the factors to consider in choosing *when* to provide parole eligibility. Would postponing eligibility until age 30, 40, or 50 be invalid as well? Apparently so, under the Fourth Circuit's rationale. As Judge Niemeyer laid bare in his dissent, the panel's sweeping rationale would invalidate virtually *any* term-of-years sentence imposed on a juvenile because "a young person's chances of serving a full sentence are inherently higher than an older person's."[114]

In short, the Fourth Circuit violated § 2254(d)(1) of AEDPA by concluding that *Graham* "clearly established" that parole eligibility at age 60 must be considered a life-without-parole sentence. Nothing in *Graham* suggests that conclusion, let alone requires it.

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[113] 560 U.S. at 70.

[114] App. 58a.

"Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require state courts to *extend* that precedent or license federal courts to treat the failure to do so as error."[115] "The appropriate time to consider the question as a matter of first impression would be on direct review, not in a habeas case governed by § 2254(d)(1)."[116] Yet this Court denied certiorari on direct review in both *Angel*[117] and *Vasquez*[118] when the petitioners there argued that Virginia's conditional-release program violated *Graham*. Judge Niemeyer was right that the majority "fail[ed] to respect, in any meaningful way, the deference Congress requires federal courts to give to state court decisions on post-conviction review under § 2254."[119]

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[115] *Woodall*, 134 S. Ct. at 1706.

[116] *Id.* at 1707.

[117] 565 U.S. at 920.

[118] 137 S. Ct. at 568. The second question presented in *Vasquez* was "[w]hether Geriatric Release satisfies the Eighth Amendment's requirement, as recognized in *Graham v. Florida*, that states provide juvenile nonhomicide offenders some realistic, meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

[119] App. 38a.

B. Until this Court resolves the conflict, the Fourth Circuit split will continue to disrupt juvenile-offender sentencing in Virginia.

The split that the Fourth Circuit's decision creates with the Supreme Court of Virginia is particularly disruptive to Virginia's criminal justice system. Although federal courts in Virginia will be bound by the panel's ruling, that ruling does *not* bind the Supreme Court of Virginia or Virginia State courts, which remain bound by *Angel*.[120] The resulting discord implicates scores of offenders currently in State custody as well as *every* new case in which a trial judge decides to impose a lengthy sentence on a serious juvenile offender.

The Virginia Department of Corrections has in custody 21 juvenile offenders convicted of crimes committed after 1994 (for which traditional parole is no longer available) who are serving life sentences but are eligible for conditional release at age 60; it has in custody an additional 75 juvenile offenders convicted of crimes committed after 1994 who are serving aggregate sentences of 40 years or longer, and who are also eligible for conditional release at age 60.[121] Although

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[120] *See Law of Judicial Precedent*, *supra* note 85, at 691 ("[L]ower federal courts don't have appellate jurisdiction over state courts. Hence, their decisions aren't binding on the state courts, which have an independent duty to decide questions of federal law as presented."); *Toghill*, 768 S.E.2d at 677 ("While this Court considers Fourth Circuit decisions as persuasive authority, such decisions are not binding precedent for decisions of this Court.") (collecting authorities).

[121] Pet. for Reh'g, *supra* note 82, at 10-11.

this Court has not yet decided if *Graham* applies to consecutive term-of-years sentences that exceed a person's lifetime—it recently denied certiorari on that question in *Vasquez*[122]—juvenile offenders serving lengthy aggregate term-of-years sentences can be expected to seek resentencing too.

Thus, potentially 96 juvenile offenders (including LeBlanc) may seek resentencing under the authority of *LeBlanc*.[123] But Virginia's judges will remain bound by *Angel*. So the split between the Fourth Circuit and the Supreme Court of Virginia ensures multiple rounds of habeas review with federal and State judges bound by irreconcilable federal and State precedents.

What is more, in *new* cases in which a Virginia court must decide how long to sentence a serious juvenile offender, the judge cannot be certain whether a lengthy sentence that is proper under *Angel* will be invalidated on federal habeas review under *LeBlanc*. If conditional release at age 60 is not available to satisfy *Graham*, then the sentence will have to be short enough to ensure release within a person's lifetime. But there is no guidance from this Court about how long is too long. And requiring that Virginia judges impose only term-of-years sentences permitting release

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[122] *Vasquez*, 781 S.E.2d at 928 ("We thus agree with the Sixth Circuit, the Fifth Circuit, and the seven dissenters of the Ninth Circuit: *Graham* does not apply to aggregate term-of-years sentences involving multiple crimes.").

[123] That number mushrooms if juvenile offenders use the panel's decision here to contest aggregate sentences *shorter* than 40 years.

within the offender's lifetime would flatly contradict *Graham*'s promise that "[a] State need not guarantee the offender eventual release."[124]

The Fourth Circuit's decision, in short, has wrought havoc in Virginia, and certiorari is warranted to resolve the intolerable conflict it has spawned.

II. The Fourth Circuit's failure to apply AEDPA's deferential standard has also created a split on whether parole eligibility at age 60 comes too late to satisfy *Graham*.

Reverberating beyond Virginia, the Fourth Circuit's decision has also created a split with the Sixth and Ninth Circuits, and with the highest courts of Louisiana and Nebraska, on whether parole eligibility at age 60 constitutes a life-without-parole sentence for purposes of *Graham* or *Miller*.[125] In *Demirdjian v. Gipson*, the Ninth Circuit held that a California court did not unreasonably determine that a 50-year prison term was *not* a life-without-parole sentence under *Miller* "because Demirdjian will be eligible for parole when he is 66 years old."[126] The Ninth Circuit correctly reasoned that this Court's 2003 decision in *Lockyer v. Andrade* showed that a life-without-parole sentence is

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[124] 560 U.S. at 82.

[125] *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) (holding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders" who commit homicide).

[126] 832 F.3d 1060, 1077 (9th Cir. 2016).

"materially distinguishable," for AEDPA purposes, from the 50-year sentence—with parole eligibility at age 87—at issue in *Lockyer*.[127] *A fortiori*, parole eligibility at age 66, as in *Demirdjian*, or at age 60, as in this case, is likewise materially distinguishable from a life-without-parole sentence.

Similarly, the Sixth Circuit held in *Starks v. Easterling* that a Tennessee court did not unreasonably determine that a 62-year prison term was not a life-without-parole sentence because the petitioner was eligible for parole at age 77.[128] The concurring judge added that "[t]he Supreme Court has not made clear where to draw the line" and "reasonable jurists can disagree whether release after 51 to 60 years is beyond the line."[129] (Although *Starks* is unpublished, the Sixth Circuit held in its earlier published opinion in *Bunch v. Smith* that *Graham* was inapplicable to an aggregate term-of-years sentence totaling 89 years, with parole eligibility at age 95.[130]) The panel ruling here conflicts with *Demirdjian* and *Starks* but fails to mention them.[131]

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[127] *Id.* (discussing *Lockyer*, 538 U.S. at 73-74 & 79).

[128] 659 F. App'x 277, 278 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017).

[129] *Id.* at 284 (White, J., concurring) (citation omitted).

[130] *Bunch v. Smith*, 685 F.3d 546, 551 & n.1 (6th Cir. 2012), *cert. denied sub nom. Bunch v. Bobby*, 133 S. Ct. 1996 (2013).

[131] Although *Demirdjian* and *Starks* were decided after oral argument, Virginia brought those cases to the court's attention under Fed. R. App. P. 28(j).

Moreover, State appellate courts, including the highest courts of Nebraska[132] and Louisiana,[133] have routinely upheld such sentences as well.[134] The Nebraska Supreme Court, for instance, found that "a number of courts have held that sentences that allow the juvenile offender to be released in his or her late sixties or early seventies satisfy the 'meaningful opportunity' requirement."[135] The court concluded that parole eligibility at "age 62 or even at age 77" complied with *Graham* because "it is not unusual for people to work well into their seventies and have a meaningful life well beyond" those ages.[136]

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[132] *State v. Smith*, 295 Neb. 957, 974-79 (2017) (rejecting *Graham* challenge to 90-years-to-life sentence with parole eligibility at age 62); *see also State v. Nollen*, 296 Neb. 94 (2017) (same, following *Smith*).

[133] *State v. Brown*, 118 So. 3d 332, 342 (La. 2013) (holding *Graham* inapplicable to 70-year aggregate sentence under which defendant would not be eligible for release until age 86).

[134] *E.g.*, *People v. Lehmkuhl*, 369 P.3d 635, 637 (Colo. App. 2013) (holding *Graham* inapplicable to juvenile offender eligible for parole at age 67); *Willbanks v. Mo. Dep't of Corr.*, WD77913, 2015 Mo. App. LEXIS 1100, at *50, 2015 WL 6468489, at *17 (Oct. 27, 2015) (holding *Graham* inapplicable to aggregate sentence of 355 years with parole eligibility at age 85); *State v. Watkins*, Nos. 13AP-133, -134, 2013 Ohio App. LEXIS 5791, at ¶ 10-11, 2013 WL 6708397, at ¶ 4-5 (Dec. 17, 2013) (upholding 67-year aggregate sentence), *appeal pending*, 10 N.E.3d 737 (Ohio 2014); *State v. Merritt*, No. M2012-00829, 2013 Tenn. Crim. App. LEXIS 1082, at *16-17, 2013 WL 6505145, at *6 (Dec. 10, 2013) (holding *Graham* inapplicable to 225-year aggregate sentence but reducing sentence to 50 years).

[135] *Smith*, 295 Neb. at 977.

[136] *Id.* at 978.

Only precedent of this Court *as of the date* of the State-court decision may be considered in determining that the State court unreasonably applied "clearly established" federal law under § 2254(d)(1).[137] The latest relevant cutoff date here is April 13, 2012, when the Supreme Court of Virginia denied LeBlanc's petition for appeal.[138]

But it is strong evidence that the law was *not* "clearly established" that so many courts since *Graham* have rejected Eighth Amendment challenges by juvenile offenders who were not eligible for parole until age 60 or later.[139] To borrow from Judge Gorsuch, when faced with a similar chorus of lower-court decisions contradicting the supposed "clearly established" Supreme Court precedent:

> To say the [State court] unreasonably applied federal law in this case we would likely have to say these courts did the same in their cases.

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[137] *Greene v. Fisher*, 132 S. Ct. 38, 43-44 (2011); *Lockyer*, 538 U.S. at 71-72.

[138] App. 66a. That was, of course, before this Court's decisions in *Miller*, 132 S. Ct. at 2455 (June 25, 2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

[139] *See Carey v. Musladin*, 549 U.S. 70, 76-77 (2006) ("Reflecting the lack of guidance from this Court, lower courts have diverged widely in their treatment of defendants' spectator-conduct claims. . . . Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' ") (quoting § 2254(d)(1)); *Price v. Vincent*, 538 U.S. 634, 643 n.2 (2003) (citing lower federal and State court cases to show that the State court's adjudication was not objectively unreasonable).

> The alternative conclusion—that the [U.S. Supreme] Court's precedents leave considerable room for discretion and that all these courts have at least *reasonably* applied its precedents—strikes us as far more likely.[140]

The chorus of authorities supporting *Angel* is also in harmony with cases in which some appellate courts have invalidated juvenile-offender sentences under the Eighth Amendment based on *Graham* or *Miller*. For parole eligibility in those cases occurred *later* than age 60—usually *much later*.[141]

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[140] *Eizember v. Trammell*, 803 F.3d 1129, 1139 (10th Cir. 2015) (Gorsuch, J.), *cert. denied sub nom. Eizember v. Duckworth*, 136 S. Ct. 2468 (2016).

[141] *E.g.*, *Moore v. Biter*, 725 F.3d 1184, 1186, 1192 (9th Cir. 2013) (invalidating under *Graham* a 254-year sentence that allowed for parole only after 127 years), *reh'g en banc denied*, 725 F.3d 1184 (9th Cir. 2014); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (holding that consecutive sentences totaling 110 years violated *Graham*); *People v. Rainer*, No. 10CA2414, 2013 Colo. App. LEXIS 509, at *40, 2013 WL 1490107, at *12 (Apr. 11, 2013) (invalidating sentence for juvenile defendant with life expectancy of 63.8 to 72 years who would not be eligible for parole until age 75), *cert. granted*, 2014 Colo. LEXIS 1085 (Dec. 22, 2014); *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1047 (Conn. 2015) (invalidating 50-year sentence with parole eligibility in offender's "late sixties"), *cert. denied sub nom. Semple v. Casiano*, 136 S. Ct. 1364 (2016); *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014) (reducing juvenile offender's 150-year cumulative sentence to 80 years); *Kelsey v. State*, 206 So. 3d 5, 6-7, 11 (Fla. 2016) (holding that *Graham* applied to a 45-year sentence for which the offender would be 68 at the time of release); *Henry v. State*, 175 So. 3d 675, 679-80 (Fla. 2015) (invalidating 90-year aggregate sentence with parole eligibility at age 95), *cert. denied*, 136 S. Ct. 1455 (2016); *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016) (holding that *Miller* requirements applied to 97-year sentence with parole eligibility after 89

In other words, the Fourth Circuit now stands as a conspicuous outlier among the States and federal circuits in holding that parole eligibility at age 60 is nonetheless a life-*without*-parole sentence under the Eighth Amendment. It was clearly wrong to have extended *Graham* that far (let alone at all) in a federal habeas case governed by the deferential standard in § 2254(d)(1).

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years); *State v. Null*, 836 N.W.2d 41, 46, 76 (Iowa 2013) (invalidating, under Iowa law only, a sentence of 52.5 years with parole eligibility at age 69); *State ex rel. Morgan v. Louisiana*, No. 2015-KH-0100, 2016 La. LEXIS 2077, at *1, 2016 WL 6125428, at *1 (Oct. 19, 2016) (holding that 99-year sentence was a life-without-parole sentence under *Graham*); *State v. Zuber*, 2017 N.J. LEXIS 5, at *10-11, 2017 WL 105004, at *3 (Jan. 11, 2017) (invalidating one sentence that provided parole eligibility at age 72 after 55 years of incarceration and another that provided parole eligibility at age 85 after 68 years of incarceration); *State v. Boston*, 363 P.3d 453, 458 (Nev. 2015) (holding that *Graham* applied to aggregate sentence requiring the offender to serve 100 years before becoming parole eligible); *State v. Moore*, No. 2014-0120, 2016 Ohio LEXIS 3037, at *27, 31, 2016 WL 7448751, at *11-12 (Ohio Dec. 22, 2016) (invalidating sentence under which offender would be eligible for release at age 92, after 77 years of incarceration); *State v. Ramos*, 387 P.3d 650, 670 (Wash. 2017) (holding that trial court properly considered the *Miller* factors before imposing a cumulative sentence that totaled 85 years); *Bear Cloud v. State*, 334 P.3d 132, 136, 141-42 (Wyo. 2014) (requiring consideration of *Miller* factors for 45-year sentence with parole eligibility at age 61). *But see State v. Pearson*, 836 N.W.2d 88, 96 (Iowa 2013) (holding only under Iowa's Constitution that *Miller* factors must be considered when sentencing a juvenile offender to 35 years in prison).

III. Summary reversal is warranted.

This Court has issued summary reversals in numerous cases in recent terms when federal circuit courts have failed to give proper deference to State-court adjudications under § 2254(d)(1).[142] The Court has appropriately admonished errant circuits to take AEDPA more seriously, lamenting that such reversal has been required "time and again."[143] The Court has also warned that § 2254(d) is "a provision of law that some federal judges find too confining, but that all federal judges must obey."[144] .

This is just such a case. "Because it is not clear that the [Virginia] Supreme Court erred at all, much less erred so transparently that no fairminded jurist

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[142] *See Woods v. Etherton*, 136 S. Ct. 1149 (2016) (per curiam); *White v. Wheeler*, 136 S. Ct. 456 (2015) (per curiam); *Woods v. Donald*, 135 S. Ct. 1372 (2015) (per curiam); *Glebe v. Frost*, 135 S. Ct. 429 (2014) (per curiam); *Lopez v. Smith*, 135 S. Ct. 1 (2014) (per curiam); *Nevada v. Jackson*, 133 S. Ct. 1990 (2013) (per curiam); *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam); *Parker v. Matthews*, 132 S. Ct. 2148 (2012) (per curiam); *Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam).

[143] *Wheeler*, 136 S. Ct. at 460.

[144] *Woodall*, 134 S. Ct. at 1701. *See also Eizember*, 803 F.3d at 1143 ("Surely we must as well assume the state court is applying the correct federal legal standard when it *tells us* it is—and when viewed fairly it appears to be—doing just that. Any other course would evince a serious disrespect for state courts, run afoul of the federalism and comity concerns that undergird AEDPA, and risk inviting reversal for misapplication of that statutory scheme.").

could agree with that court's decision, the [Fourth] Circuit's judgment must be reversed."[145]

CONCLUSION

This Court should grant the petition for writ of certiorari. It should then summarily reverse the judgment of the Fourth Circuit and remand the case with instructions to dismiss the petition for habeas corpus.

Respectfully submitted,

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March 28, 2017

[145] *Bobby*, 132 S. Ct. at 27.

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-7151

DENNIS LEBLANC,

Petitioner - Appellee,

v.

RANDALL MATHENA, Chief Warden,
Red Onion State Prison, Pound, Virginia;
COMMONWEALTH OF VIRGINIA,

Respondents - Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Arenda L. Wright Allen, District Judge. (2:12-cv-00340-AWA-LRL)

Argued: May 10, 2016 Decided: November 7, 2016

Amended: November 10, 2016

(Filed Nov. 10, 2016)

Before NIEMEYER and WYNN, Circuit Judges, and Thomas E. JOHNSTON, United States District Judge

for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Wynn wrote the opinion, in which Judge Johnston joined. Judge Niemeyer wrote a dissenting opinion.

ARGUED: Stuart Alan Raphael, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Bryan A. Stevenson, EQUAL JUSTICE INITIATIVE, Montgomery, Alabama, for Appellee. **ON BRIEF**: Mark R. Herring, Attorney General of Virginia, Linda L. Bryant, Deputy Attorney General, Criminal Justice & Public Safety Division, Donald E. Jeffrey, III, Senior Assistant Attorney General, Eugene P. Murphy, Senior Assistant Attorney General, Katherine Quinlan Adelfio, Assistant Attorney General, Trevor S. Cox, Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Jennifer T. Stanton, J.T. STANTON, P.C., Norfolk, Virginia; Randall S. Susskind, Jennae R. Swiergula, Stephen Chu, EQUAL JUSTICE INITIATIVE, Montgomery, Alabama, for Appellee.

WYNN, Circuit Judge:

Graham v. Florida, 560 U.S. 48, 74 (2010), held that "the Eighth Amendment forbids the sentence of life without parole" for juvenile offenders convicted of nonhomicide offenses. Accordingly, the Supreme Court held that States must provide juvenile nonhomicide offenders sentenced to life imprisonment with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

Nearly a decade before the Supreme Court decided *Graham*, Respondent, the Commonwealth of Virginia, sentenced Petitioner Dennis LeBlanc to life imprisonment without parole for a nonhomicide offense he committed at the age of sixteen. In light of *Graham*, Petitioner sought postconviction relief from his sentence in Virginia state courts. The state courts denied Petitioner relief, holding that Virginia's geriatric release program--which was adopted more than fifteen years before the Supreme Court decided *Graham* and will allow Petitioner to seek release beginning at the age of sixty--provides the "meaningful opportunity" for release that *Graham* requires.

Mindful of the deference we must accord to state court decisions denying state prisoners postconviction relief, we nonetheless conclude that Petitioner's state court adjudication constituted an unreasonable application of *Graham*. Most significantly, Virginia courts unreasonably ignored the plain language of the procedures governing review of petitions for geriatric release, which authorize the State Parole Board to deny

geriatric release for any reason, without considering a juvenile offender's maturity and rehabilitation. In light of the lack of governing standards, it was objectively unreasonable for the state courts to conclude that geriatric release affords Petitioner with the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" *Graham* demands. *Id.* Accordingly, Petitioner is entitled to relief from his unconstitutional sentence.

I.

On July 15, 2002, a Virginia state trial court found Petitioner guilty of rape and abduction. Petitioner committed the offenses on July 6, 1999, when he was sixteen years old. The court sentenced Petitioner to two terms of life imprisonment. Petitioner was ineligible for parole pursuant to Va. Code Ann. § 53.1-165.1, which abolished parole for individuals convicted of a felony committed after January 1, 1995. Petitioner did not appeal his conviction or sentence.

In 2011, Petitioner filed a motion to vacate his sentence in state trial court. The motion argued that *Graham* rendered Petitioner's life sentence invalid. In opposition, Respondents asserted that, notwithstanding Virginia's abolition of parole, Petitioner's life sentence did not violate *Graham* because Virginia allows for conditional release of "geriatric prisoners," Va. Code Ann. § 53.1-40.01 ("Geriatric Release").

At a hearing on August 9, 2011, the state trial court orally denied Petitioner's motion to vacate. In

rendering its decision, the trial court relied on the Supreme Court of Virginia's decision in *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), which held that Geriatric Release provides juveniles sentenced to life in prison a "meaningful opportunity for release" and therefore complies with *Graham*'s parole requirement. J.A. 157. Petitioner appealed the trial court's decision to the Supreme Court of Virginia, which summarily denied his petition for appeal.

On June 19, 2012, Petitioner filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia. A federal magistrate judge reviewed the petition and recommended that the district court deny it. *LeBlanc v. Mathena*, No. 2:12-cv-340, 2013 WL 10799406, at *1 (E.D. Va. July 24, 2013). Petitioner filed objections to the magistrate judge's report. Finding the objections well-taken, the district court granted Petitioner's habeas petition, holding that his state court adjudication was contrary to, and an unreasonable application of, *Graham*. *LeBlanc v. Mathena*, No. 2:12cv340, 2015 WL 4042175, at *9 (E.D. Va. July 1, 2015). In particular, the district court concluded that Geriatric Release does not offer juvenile offenders sentenced to life imprisonment, like Petitioner, the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" required by *Graham*. *Id.* at *9, *11-18. The district court further concluded that Geriatric Release did not comply with *Graham*'s dictate that state penal systems reflect the lesser culpability of juvenile offenders, explaining that Geriatric Release "treats children

worse" than adult offenders. *Id.* at *14 (emphasis in original). Accordingly, the district court remanded Petitioner's case to the state court for resentencing in accordance with *Graham*. *Id.* at *19.

Respondents filed a timely appeal, and the district court stayed its judgment pending resolution of that appeal.

II.

A.

The Virginia General Assembly established Geriatric Release in 1994--more than 15 years before the Supreme Court decided *Graham*--as part of its "truth-in-sentencing" reform package. J.A. 169. The primary goal of truth-in-sentencing reform was to close the gap between prisoners' original sentences and the amount of time they actually served. Brian J. Ostrom et al., Truth-in-Sentencing in Virginia 17-20 (April 5, 2001), available at https://www.ncjrs.gov/pdffiles1/nij/grants/187677.pdf. The centerpiece of the reform package was the elimination of parole for all offenders who committed felonies on or after January 1, 1995. *Id.*

The statutory provision governing Geriatric Release, as amended,[1] provides, in its entirety:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a

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[1] The original provision applied only to offenders who were ineligible for parole. A 2001 amendment expanded the provision to apply to all inmates.

> Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

Va. Code Ann. § 53.1-40.01. Unlike with other components of the truth-in-sentencing reform package,[2] we have identified no evidence in the contemporaneous legislative record speaking to the General Assembly's goal in enacting Geriatric Release or providing guidance regarding the implementation of Geriatric Release.

The Virginia Parole Board is responsible for deciding whether to grant petitions for Geriatric Release. Section 53.1-40.01 directs the Parole Board to promulgate regulations necessary to implement the statute. Pursuant to that authority, the Parole Board established administrative procedures governing implementation of the Geriatric Release provision (the "Geriatric Release Administrative Procedures").

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[2] The legislative history of the truth-in-sentencing reform package focuses on the abolition of parole, establishment of uniform sentencing guidelines and a sentencing commission, elimination of "good time" credits, and imposition of longer sentences for violent offenders. Commonwealth of Va. Comm'n on Sentencing & Parole Reform, Report of the Commission on Sentencing & Parole Reform to the Governor and General Assembly of Virginia, H. Doc. No. 18 (Dec. 23, 1994).

The Geriatric Release Administrative Procedures set forth a two-stage review process for Geriatric Release petitions. At the "Initial Review" stage, the Parole Board reviews a prisoner's petition--which must provide "compelling reasons for conditional release"--and the prisoner's "central file and any other pertinent information." J.A. 287. The Parole Board may deny the petition at the Initial Review stage based on a majority vote. Neither the statute nor the Geriatric Release Administrative Procedures states what constitute "compelling reasons for conditional release," nor does either document require the Parole Board to consider any particular factors in conducting the Initial Review, nor does either document set forth any criteria for granting or denying a prisoner's petition at the Initial Review stage.

If the Parole Board does not deny a petition at the Initial Review stage, the petition moves forward to the "Assessment Review" stage. As part of the Assessment Review, a Parole Board member or designated staff member interviews the prisoner. During that interview, the prisoner may present written and oral statements as well as any written material bearing on his case for parole. The interviewer then drafts a written assessment of the prisoner's "suitability for conditional release" and, based on that assessment, recommends whether the Parole Board should grant the petition. J.A. 288. In order to grant Geriatric Release to a prisoner sentenced to life imprisonment, at least four members of the five-member Parole Board must vote in favor of release.

In engaging in the Assessment Review, Parole Board members should consider "[a]ll factors in the parole consideration process including Board appointments and Victim Input." *Id.* The Virginia Parole Board Policy Manual includes a long list of "decision factors" to be considered in the parole review process. J.A. 297. These factors include: public safety, the facts and circumstances of the offense, the length and type of sentence, and the proposed release plan. The Parole Board also should consider certain characteristics of the offender, including "the individual's history, physical and mental condition and character, . . . conduct, employment, education, vocational training, and other developmental activities during incarceration," prior criminal record, behavior while incarcerated, and "changes in motivation and behavior." J.A. 297-99. Finally, the Parole Board should consider impressions gained from interviewing the prisoner as well as information from family members, victims, and other individuals.

B.

There are several key ways in which Geriatric Release differs from Virginia's parole system, which remains in place for prisoners who committed their offenses before January 1, 1995. The first--and most obvious--is the age limitation. In order to seek Geriatric Release, an inmate must be at least sixty years of age. By contrast, most parole-eligible inmates serving a life sentence will be considered for parole for the first time after serving fifteen years of their sentence. Va.

Code Ann. § 53.1-151(C). Other prisoners will be considered for parole when they serve a certain percentage of their sentence. *Id.* § 53.1-151(A). Accordingly, whereas Petitioner would have been considered for parole after serving twenty years of his sentence, Petitioner cannot apply for Geriatric Release until roughly twenty years later.

The second difference is that an inmate must actively petition for Geriatric Release once he or she becomes eligible, whereas the Parole Board automatically considers, on an annual basis, whether to release each parole-eligible inmate.

A third difference is that, unlike with parole, the Parole Board may deny a petition for Geriatric Release at the Initial Review stage without considering any of the "decision factors" enumerated in the Parole Board Policy Manual. Indeed, unlike the parole system, which has established criteria that the Parole Board must consider in granting or denying parole, Geriatric Release affords the Parole Board unconstrained discretion to deny a petition for Geriatric Release at the Initial Review stage. Relatedly, in their petition, prisoners must "identify compelling reasons" why they should receive Geriatric Release, notwithstanding that the "compelling reasons" requirement has no statutory basis and that the Geriatric Release Administrative Procedures do not provide any guidance regarding what constitutes a "compelling reason." J.A. 287. By contrast, there is no requirement that a parole-eligible inmate demonstrate "compelling reasons" in order to obtain parole.

Fourth, the Parole Board or its designee interviews prisoners undergoing parole review as a matter of course. By contrast, the Parole Board can deny a petition for Geriatric Release at the Initial Review stage "on a review of the record," without interviewing the inmate. J.A. 287.

A final notable difference is that four members of the five-member Parole Board must approve Geriatric Release of inmates sentenced to life imprisonment. By contrast, only three members of the Parole Board must approve parole of parole-eligible prisoners.

III.

We review the district court's decision to grant Petitioner's habeas petition *de novo*. *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012). The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which accords deference to final judgments of state courts, circumscribes our review. *Nicolas v. Att'y Gen. of Md.*, 820 F.3d 124, 129 (4th Cir. 2016). Under AEDPA, a federal court may grant habeas relief to a state prisoner, like Petitioner, if the prisoner's state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," *id.* § 2254(d)(2).

Respondents contend that the Virginia courts' conclusion that Geriatric Release complies with *Graham*'s parole requirement amounted to a finding of fact, and therefore that the standard set forth in 28 U.S.C. § 2254(d)(2) applies. Federal courts review habeas petitions raising questions of law or mixed questions of law and fact under Section 2254(d)(1). *Horn v. Quarterman*, 508 F.3d 306, 312 (5th Cir. 2007); *see also, e.g.*, *Barnes v. Joyner*, 751 F.3d 229, 246-52 (4th Cir. 2014) (analyzing habeas petition raising mixed question of law and fact under Section 2254(d)(1)). By contrast, Section 2254(d)(2) applies to questions of historical fact. *Weaver v. Palmateer*, 455 F.3d 958, 963 n.6 (9th Cir. 2006); *Ouber v. Guarino*, 293 F.3d 19, 27 (1st Cir. 2002) ("[T]he special prophylaxis of section 2254(d)(2) applies only to determinations of basic, primary, or historical facts." (internal quotation omitted)).

Here, the Virginia courts' evaluation of whether Geriatric Release complies with *Graham*'s parole requirement implicates questions of law, and therefore is subject to review under Section 2254(d)(1). *See, e.g.*, *Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) (holding that a state court decision was contrary to clearly established law when it held that *Graham* did not bar a juvenile nonhomicide offender's sentence under which he would be eligible for parole in 127 years); *Bunch v. Smith*, 685 F.3d 546, 549-50 (6th Cir. 2012) (analyzing whether 89-year sentence was functional equivalent of life sentence for purposes of *Graham* under Section 2254(d)(1)). Therefore, we must determine whether the state court's decision was "contrary to, or

involved an unreasonable application of clearly established" Supreme Court law. 28 U.S.C. § 2254(d)(1).

In assessing a state prisoner's habeas claims, we review the "last reasoned" state court decision. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Grueninger v. Dir., Va. Dep't of Corrs.*, 813 F.3d 517, 525 (4th Cir. 2016). "Unless a state-court opinion adopts or incorporates the reasoning of a prior opinion, AEDPA generally requires federal courts to review one state decision." *Wooley v. Rednour*, 702 F.3d 411, 421 (7th Cir. 2012) (internal quotation omitted). However, "[i]f the last reasoned decision adopts or substantially incorporates the reasoning from a previous state court decision, we may consider both decisions to fully ascertain the reasoning of the last decision." *Edwards v. Lamarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (internal quotation omitted); Brian R. Means, Federal Habeas Manual § 3:7 (2016) ("[W]here the last reasoned state court decision adopts or substantially incorporates the reasoning from a previous decision, it is acceptable for the federal court to look at both state court decisions to fully ascertain the reasoning of the last decision.").

The Supreme Court of Virginia summarily affirmed the trial court's oral denial of Petitioner's motion to vacate. Accordingly, the trial court decision constitutes the last reasoned decision for purposes of our analysis. *Nicolas*, 820 F.3d at 129. The trial court relied on *Angel*'s reasoning regarding the Geriatric Release provision's compliance with *Graham*'s parole requirement. Accordingly, we must consider both the trial court's decision and *Angel* in determining

whether Petitioner's state court adjudication was "contrary to, or an unreasonable application of" *Graham*--the question to which we now turn.

IV.

A.

The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII; *Roper v. Simmons*, 543 U.S. 551, 560 (2005). "To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham*, 560 U.S. at 58 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

Graham rests on a long line of Supreme Court decisions addressing the constraints imposed by the Eighth Amendment on the punishment of juvenile offenders. In *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988), the Supreme Court held that the Eighth Amendment prohibits the death penalty for offenders who committed their crimes before the age of sixteen. The Court grounded its decision on the principle "that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 834 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)).

"[A]dolescents as a class are less mature and responsible than adults," the Court explained. *Id.* "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." *Id.* at 835. Accordingly, a juvenile's transgression is "not as morally reprehensible as that of an adult." *Id.* Because juvenile offenders are not as personally culpable as adult offenders, juvenile offenders should not receive punishments as severe as those inflicted on adult offenders, the Court held. *Id.* at 834.

In *Roper v. Simmons*, the Supreme Court again emphasized the unique characteristics of youth when it extended *Thompson*'s bar on the death penalty to all individuals who committed their offenses before the age of eighteen. 543 U.S. at 578. Like *Thompson*, the *Roper* Court highlighted juveniles' "lack of maturity and underdeveloped sense of responsibility" and propensity for "reckless behavior." *Id.* at 569 (citations omitted). *Roper* further noted that "the character of a juvenile is not as well formed as that of an adult" and juveniles' "personality traits are more transitory, less fixed." *Id.* at 570. As a result, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* "Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in

younger years can subside.'" *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

Against this backdrop, *Graham* held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." 560 U.S. at 74. The Court explained that "[t]his *clear line* is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Id.* (emphasis added). In reaching this conclusion, the Court again highlighted the "lessened culpability" of juveniles, noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* at 68. Moreover, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of an 'irretrievably depraved character' than are the actions of adults." *Id.* (quoting *Roper*, 543 U.S. at 570).

Graham explained that life without parole is "the second most severe penalty permitted by law," behind only the death penalty, because it "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency--the remote possibility of which does not mitigate the harshness of the sentence." *Id.* at 69-70 (citations omitted). If a juvenile is sentenced to life in prison without the possibility of parole, he or she has "no chance for

fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 79.

Additionally, "[b]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability." *Id.* at 74. Accordingly, the sentence of life without parole for a juvenile nonhomicide offender will always be "disproportionate" under the Eighth Amendment because it always relies on a judgment "made at the outset" that the defendant is incorrigible. *Id.* at 73. And while some juvenile offenders may ultimately prove to pose a risk to society for the rest of their lives, "[a] life without parole sentence improperly denies the juvenile offender a *chance* to demonstrate growth and maturity" later in life. *Id.* at 73 (emphasis added).

Although *Graham* left it to "the State[s], in the first instance, to explore the means and mechanisms" to comply with its dictates, *id.* at 75, the decision established at least three minimum requirements for parole or early release programs for juvenile nonhomicide offenders sentenced to life imprisonment, like Petitioner.[3]

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[3] We address these three requirements because they are particularly relevant to the Geriatric Release program and Petitioner's state court adjudication. We take no position on whether

First, *Graham* held that such offenders must have the opportunity "to obtain release *based on demonstrated maturity and rehabilitation*." *Id.* at 75 (emphasis added). Put differently, the juvenile offender must have a "chance to later demonstrate that he is fit to rejoin society" and that "the bad acts he committed as a teenager are not representative of his true character." *Id.* at 79. To that end, a parole or early release system does not comply with *Graham* if the system allows for the lifetime incarceration of a juvenile nonhomicide offender based solely on the heinousness or depravity of the offender's crime. *Id.* at 75 ("[The Eighth Amendment] prohibit[s] States from making the judgment at the outset that [juvenile nonhomicide offenders] never will be fit to reenter society."); *id.* at 76 (stating that the Eighth Amendment prohibits courts "from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character' " (quoting *Roper*, 543 U.S. at 572)).

Second, *Graham* held that the opportunity to obtain release must be "meaningful," which means that the opportunity must be "realistic" and more than a "remote possibility." *Id.* at 70, 75, 82. *Graham*'s "meaningful[ness]" requirement reflects the Supreme Court's long-standing characterization of "[p]arole [a]s a regular part of the rehabilitative process. Assuming good

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Graham established--clearly or otherwise--other minimum requirements for parole or early release programs for juvenile nonhomicide offenders sentenced to life imprisonment.

behavior, it is the normal expectation in the vast majority of cases." *Solem*, 463 U.S. at 300-03. Because parole is the "normal expectation," it should be "possible to predict, at least to some extent, when parole might be granted." *Id.* (holding that, for purposes of the Eighth Amendment, executive clemency is not a substitute for parole because clemency is an "ad hoc" process that provides inmates with nothing more than a "bare possibility" of release). To that end, *Graham* held that the availability of executive clemency did not satisfy the "meaningful opportunity to obtain release" requirement. 560 U.S. at 69-70.

Third, *Graham* held that a state parole or early release program must account for the lesser culpability of juvenile offenders: "An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Id.* at 76; *see also Miller v. Alabama*, 132 S. Ct. 2455, 2465-66 (2012) (explaining that *Graham*'s "foundational principle" is "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children").[4] Accordingly, a state parole or early release system that

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[4] The Supreme Court decided *Miller* after Petitioner's state-court adjudication. Although Petitioner may obtain relief only based on law clearly established by the Supreme Court as of the date of his adjudication, we may look to decisions post-dating his adjudication for guidance regarding the interpretation and application of clearly established Supreme Court precedent predating the state court adjudication. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (relying on post-adjudication opinion to "illustrat[e] . . . proper application" of clearly established precedent); *Frazer v. South Carolina*, 430 F.3d 696, 716 (4th Cir. 2005) (Motz,

subjects juvenile offenders to more severe punishments than their adult counterparts necessarily violates *Graham*.

B.

With these three principles in mind--(1) that juvenile nonhomicide offenders sentenced to life imprisonment must have the "opportunity to obtain release based on demonstrated maturity and rehabilitation," (2) that this opportunity must be "meaningful," and (3) that the early release or parole system must take into account the lesser culpability of juvenile offenders--we must determine whether the conclusion of the trial court and *Angel* that Geriatric Release complies with *Graham's* parole requirement was "contrary to, or an unreasonable application of" *Graham*.[5]

J., concurring) ("Where . . . a Supreme Court decision post-dating state collateral review . . . simply *illustrates* the appropriate application of Supreme Court precedent that pre-dates the state-court determination . . . , a federal court on habeas may consider the postdated opinion.").

[5] It is important to note that this case does not present the question of whether a lengthy term-of-years sentence for a juvenile is the functional equivalent of life without parole under *Graham*. That question has thus far divided courts. *Compare Bunch*, 685 F.3d at 550 (holding that *Graham* did not clearly establish that an [sic] lengthy term-of-years sentence for a juvenile offender would violate the Eighth Amendment), *Vasquez v. Commonwealth*, 781 S.E.2d 920, 925 (Va. 2016) (holding that *Graham* did not address term-of-years sentences, even if they exceed the prisoner's life expectancy), *and State v. Brown*, 118 So. 3d 332, 342 (La. 2013) (concluding that *Graham* did not reach term-of-years sentences), *with Moore*, 725 F.3d at 1186 (holding that *Graham*

1.

A state court adjudication is contrary to clearly established law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at [the opposite] result." *Williams v. Taylor*, 529 U.S. 362, 405 (2000); *Barbe v. McBride*, 521 F.3d 443, 453-54 (4th Cir. 2006).

Here, *Angel*, upon which the state trial court entirely relied, correctly identified *Graham* as controlling and recognized each of the three minimum requirements set forth above for a parole or early release program for juvenile nonhomicide offenders sentenced to life imprisonment. In particular, *Angel* repeatedly stated that *Graham* requires that juvenile offenders be afforded an opportunity for "release based on maturity and rehabilitation." 704 S.E.2d at 402. Likewise, the

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clearly prohibited a sentence under which a juvenile offender who would not be eligible for parole until age 144), *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, [sic] (Conn. 2015) (holding that "a fifty year term and its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope'" (quoting *Graham*, 560 U.S. at 79)), *Bear Cloud v. State*, 334 P.3d 132, 136, 141-42 (Wyo. 2014) (holding that a sentence that would keep the defendant in prison until age sixty-one was the functional equivalent of a life sentence), *and State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (holding that "*Miller*'s principles are fully applicable to a lengthy term-of-years sentence").

Angel court acknowledged that the opportunity for release must be "meaningful." *Id.*[6] And *Angel* recognized that *Graham* demands that state penal systems account for the "limited moral culpability of juvenile offenders." *Id.* at 401. Accordingly, Petitioner's state court adjudication was not "contrary to" *Graham*. *Bell v. Cone*, 535 U.S. 685, 698 (2002) (holding that state court adjudication that "correctly identified the principles announced [by the Supreme Court] as those governing the analysis . . . was [not] contrary to . . . clearly established law").

2.

Petitioner, therefore, may obtain relief only if his state court adjudication amounted to an "unreasonable application" of *Graham*. A state court decision amounts to an "unreasonable application" of clearly established Supreme Court precedent if it "'identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts' of the prisoner's case." *Grueninger*, 813 F.3d at 524 (quoting *Wiggins*, 539 U.S. at

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[6] Notwithstanding their contention that *Graham* "does not address what type of parole is necessary to meet its standard," Respondents concede that *Graham* held that juvenile nonhomicide offenders sentenced to life imprisonment must have the opportunity to "obtain release based on maturity and rehabilitation" and that this opportunity must be "meaningful." Appellants' Br. at 37, 49. Accordingly, even Respondents concede that *Graham* establishes minimum requirements for parole or early release programs.

520). To satisfy this standard, the state court adjudication must be "more than incorrect or erroneous;" it must be "objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). That being said, to reach a decision that constitutes an "unreasonable application" of Supreme Court precedent, a state court need not address an identical factual or legal scenario to that previously addressed by the Supreme Court: "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

For several reasons, we agree with Petitioner that his state court adjudication constituted an "unreasonable application" of *Graham*.

First, Geriatric Release does not necessarily provide Petitioner--or any other inmate, juvenile or otherwise--the opportunity to obtain release "based on demonstrated maturity and rehabilitation," as *Graham* requires. In concluding that Geriatric Release satisfied this requirement, *Angel* emphasized that "if the prisoner meets the qualifications for consideration contained in the statute, the factors used in the normal parole consideration process apply to conditional release decisions under this statute." 704 S.E.2d at 402. Assuming *arguendo* the "decision factors" used in the normal parole consideration process adequately account for a juvenile offender's "maturity and rehabilitation,"[7] this conclusion ignores the Parole Board's

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[7] The dissent incorrectly asserts that we conclude that the parole "decision factors" do not account for a juvenile offender's

authority to deny Geriatric Release for any reason--and without consideration of the "decision factors"--and therefore is objectively unreasonable.

Under the Geriatric Release Administrative Procedures, the Parole Board must consider the "decision factors"--the "factors used in the normal parole consideration process"--*during the Assessment Review stage*. But the Parole Board may deny a petition for Geriatric Release *for any reason*--without consideration of the "decision factors"--*at the Initial Review stage*. It was objectively unreasonable to conclude that Geriatric Release satisfied *Graham*'s requirement that juvenile offenders be able to obtain release "based on maturity and rehabilitation," when, under the plain and unambiguous language of the governing procedures, the Parole Board can deny *every* juvenile offender Geriatric Release for *any* reason whatsoever.[8]

"maturity and rehabilitation." *Post* at 19. To the contrary, because the Parole Board may deny a juvenile offender Geriatric Release at the Initial Review stage without considering the "decision factors," we need not--and thus do not--decide whether the "decision factors" adequately account for a juvenile offender's "maturity and rehabilitation," as *Graham* requires.

[8] Because the Geriatric Release Administrative Procedures do not require consideration of maturity and rehabilitation--or any other factors--we need not, and thus do not, decide whether a statute or regulation requiring only that a state decision-maker *consider* "maturity and rehabilitation" satisfies *Graham*'s requirement that juvenile offenders have the opportunity to obtain release "*based on* demonstrated maturity and rehabilitation." 560 U.S. at 75 (emphasis added).

Like Respondents, the dissent seeks to insulate *Angel* from collateral review by claiming that "the Virginia Supreme Court's conclusion that Virginia law requires consideration of 'normal parole factors' such as rehabilitation and maturity is one of state law and thus is binding on this court." *Post* at 19-20. But, contrary to Respondents' and the dissent's characterization, *Angel* does not hold that the Geriatric Release Administrative Procedures "require" consideration of the "decision factors." Rather, *Angel* states that the "decision factors" "*apply* to conditional release decisions," but never addresses whether--much less holds that--the Parole Board *must* consider the "decision factors" in reviewing every petition for Geriatric Release. 704 S.E.2d at 402 (emphasis added).

Indeed, by reading *Angel* as "requir[ing]" consideration of the "decision factors," the dissent puts *Angel* into direct conflict with the plain language of the Geriatric Release Administrative Procedures, which permit the Parole Board to deny a petition for Geriatric Release at the Initial Review stage for any reason, and without consideration of the "decision factors." *See supra* Part II. But in predicting how state courts would resolve an unsettled issue of state law, we must reject, if at all possible, predictions that would ascribe absurd or irrational conclusions to state courts. *See, e.g.*, *Pena v. Greffet*, 110 F. Supp. 3d 1103, 1134 (D.N.M. 2015) (refusing to predict that state court would resolve unsettled issue of state law in a way that "would produce absurd results"); *Union Cnty. Ill. v. MERSCORP, Inc.*,

920 F. Supp. 2d 923, 931 (S.D. Ill. 2013) (adopting prediction of state law that was "[t]he only non-absurd, non-inconvenient way to read the language of the law itself and the language of Illinois appellate courts"); *Jakomas v. McFalls*, 229 F. Supp. 2d 412, 424 (W.D. Pa. 2002) (rejecting plaintiff's contention that state court would interpret state law in a way that would lead to an "absurd result"). Accordingly, we refuse to read *Angel*'s description of the Geriatric Release Administrative Procedures as "apply[ing]" the "decision factors" as requiring that the Parole Board consider those factors at the Initial Review stage, as the dissent proposes.

Contrary to the dissent's position, *Angel*'s error is not that it irrationally interpreted the Geriatric Release Administrative Procedures as requiring consideration of the "decision factors." Rather, *Angel* unreasonably concluded that the potential for consideration of maturity and rehabilitation at the Assessment Review stage is adequate to comply with Graham's requirement that States afford juvenile nonhomicide offenders a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," 569 U.S. at 75, when the Procedures allow the Parole Board to deny Geriatric Release for any reason at the Initial Review stage and therefore provide no guarantee that the Parole Board will consider a juvenile offender's maturation and rehabilitation--a question of federal constitutional law. Indeed, under the Geriatric Release Administrative Procedures, the Parole Board could allow Petitioner to die in prison without ever having considered whether Petitioner had matured or was

rehabilitated. *Graham* does not countenance such a possibility. 560 U.S. at 74, 79 (rejecting sentences of life without parole for juvenile nonhomicide offender because such a penalty "guarantee[s] [the offender] will die in prison without any meaningful opportunity to obtain release" and "foreswears altogether the rehabilitative ideal").

Geriatric Release also fails to comply with *Graham*'s requirement that juvenile offenders have the opportunity to obtain release "based on demonstrated maturity and rehabilitation" because it allows for the lifetime incarceration of a juvenile nonhomicide offender based solely on the heinousness or depravity of the offender's crime. Data provided by the Virginia Criminal Sentencing Commission shows that, to date, 95.4 percent of the denials of Geriatric Release have been based on the "serious nature of the crime." J.A. 178.[9] Accordingly, the Parole Board denies Geriatric Release petitions in *nearly every case* on grounds that

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[9] The Sentencing Commission's 95.4 percent figure reflects adjudications of Geriatric Release petitions filed by adult offenders only. There is no data available regarding adjudications of Geriatric Release petitions by juvenile offenders because no juvenile offender sentenced to life imprisonment without parole in Virginia has reached the age of sixty. Respondents maintain the absence of data on the adjudication of Geriatric Release petitions by juvenile offenders precludes reliance on this data. We agree with the district court, however, that "[c]ompelling juveniles who are currently serving sentences of life without the possibility of parole to wait until enough similarly situated juveniles reach age sixty so that courts can reassess the probabilities and statistics related to geriatric release perpetuates the injustice that *Graham* sought to correct." *LeBlanc*, 2015 WL 4042175, at *17.

the petitioners' "crimes demonstrate an 'irretrievably depraved character'"--directly contrary to *Graham*'s instruction that state penal regimes take into account a juvenile nonhomicide offender's greater "capacity for change" relative to his adult counterparts by giving such offender the opportunity "to demonstrate that the bad acts he committed as a teenager are not representative of his true character." 560 U.S. at 73, 79.

For this reason, the dissent misconstrues *Graham* when it appeals to the conduct giving rise to Petitioner's conviction and Petitioner's conduct at sentencing to justify its position. *Post* at 5-6. Rather, *Graham* forbids States from making a "judgment . . . at the outset" that a juvenile offender is "incorrigible" because juvenile offenders have a "capacity for change." 560 U.S. at 73, 79.

A second reason Petitioner's adjudication was objectively unreasonable is that the Geriatric Release program does not offer juvenile nonhomicide offenders the "meaningful" opportunity for release traditionally afforded by parole. Tellingly, when analyzing whether Geriatric Release complied with *Graham*, the *Angel* court said that "the effect of [the juvenile defendant's life] sentences is that [he] *will* spend the rest of his life confined in the penitentiary." 704 S.E.2d at 401 (emphasis added). The Supreme Court of Virginia, therefore, *expected* the defendant in *Angel*--who was 17 when he committed his offenses and less than 4 years older when the Supreme Court of Virginia decided his appeal--would spend his life [sic] jail, notwithstanding the availability of Geriatric Release and that the

defendant had had only four years to "grow[] and matur[e]." *Graham*, 560 U.S. at 73. But under clearly established Supreme Court precedent--precedent repeatedly relied on by *Graham*, *id.* at 70--"parole" should be the "normal expectation in the vast majority of cases," *Solem*, 463 U.S. at 300-03. It was objectively unreasonable, therefore, for the Supreme Court of Virginia to take the position that a penal regime under which it concedes early release is the exception, rather than the expectation, complies with *Graham*'s meaningfulness requirement.

Relatedly, Geriatric Release also fails to satisfy the "meaningful" opportunity requirement because there are no standards governing the denial of Geriatric Release petitions. In the context of determining whether a life sentence without parole complied with the Eighth Amendment, the Supreme Court explained that "[t]he law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time," allowing prisoners "to predict, at least to some extent, when parole might be granted." *Id.* at 300-01. By contrast, mechanisms that allow a decision-maker to grant or deny early release "for any reason without reference to any standards," offer inmates nothing more than a "bare possibility" of release and therefore do not constitute "parole" for purposes of the Eighth Amendment.[10] *Id.* at 301.

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[10] The dissent claims that *Graham* only "requir[es] that the parole board have an *ability* to consider . . . evidence [of maturity

As explained above, the Geriatric Release statute does not provide the Parole Board with *any* guidance regarding what factors it must consider in deciding whether to release a geriatric prisoner. *See supra* Part II.A. And, as Petitioner correctly notes, the Geriatric Release Administrative Procedures authorize the Parole Board to deny a petition for Geriatric Release at the Initial Review stage *for any reason*. Without any statutory or administrative guidance regarding what constitutes a "compelling reason" warranting release or setting forth the criteria for denying a juvenile offender's petition for Geriatric Release at the Initial Review stage, it is impossible to predict whether and when--if at all--the Parole Board will grant Geriatric Release. Accordingly, Geriatric Release does not afford juvenile nonhomicide offenders the "meaningful" opportunity to obtain release to which *Graham* entitles them. *See Graham*, 560 U.S. at 69-70 (holding that executive clemency, which the Supreme Court has recognized lacks governing standards, did not constitute

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and rehabilitation] in deciding whether the offender should be released." *Post* at 22 (emphasis added). *Graham*'s holding that executive clemency does not comply with the "meaningful opportunity for release" requirement belies the dissent's assertion. In particular, notwithstanding that an executive has unfettered discretion to grant clemency--and therefore is "able" to consider an offender's rehabilitation and maturity in deciding whether to grant clemency--executive clemency does not comply with *Graham*'s parole requirement because it is an "ad hoc" process without any governing standards. 560 U.S. at 69-70 (citing *Solem*, 463 U.S. at 300-01). For purposes of *Graham*, the key issue is not whether the Parole Board is "able" to consider a juvenile offender's rehabilitation and maturity--it is whether the Parole Board *must* consider rehabilitation and maturation. *See supra*.

"meaningful opportunity to obtain release" for juvenile offenders sentenced to life imprisonment).

Third, the state courts unreasonably concluded that the Geriatric Release program complies with *Graham*'s dictate that state punishment regimes account for the lesser culpability of juvenile offenders. In particular, even if the Parole Board was required to consider the "decision factors" in deciding whether to grant a petition for Geriatric Release--which it is not--a prisoner's youth at the time of his offense is not among those decision factors. Therefore, neither the Geriatric Release statute nor the Geriatric Release Administrative Procedures require that the Parole Board consider the "special mitigating force of youth," *Thompson*, 487 U.S. at 834, as *Graham* requires.

More significantly--and as the district court correctly noted--Geriatric Release treats juvenile offenders sentenced to life imprisonment "*worse*" than adult offenders receiving the same sentence because juvenile offenders "must serve a larger percentage of their sentence than adults do before eligibility to apply for geriatric release." *LeBlanc*, 2015 WL 4042175, at *14. For example, under Geriatric Release, a fifty-year-old sentenced to life in prison will be eligible to apply for Geriatric Release in ten years, but a sixteen-year-old will have to serve forty-four years before receiving his first opportunity to apply for Geriatric Release. *Graham* emphasized that a life sentence is "especially harsh" for a juvenile offender relative to an adult offender because, under such a sentence, the "juvenile offender

will on average serve more years and a greater percentage of his life in prison than an adult offender." 560 U.S. at 70. Given that (1) the Supreme Court specifically held that sentencing systems that require juvenile offenders to serve more years and/or a greater percentage of their lives relative to adult offenders violate the Eighth Amendment's proportionality principle and that (2) Geriatric Release subjects juvenile offenders to longer--and proportionately longer--sentences, it was objectively unreasonable to conclude that Geriatric Release complied with *Graham*.

3.

The dissent does not dispute that the Geriatric Release Administrative Procedures permit the Parole Board to deny a petition for Geriatric Release for any reason at the Initial Review stage, without consideration of the "decision factors," *post* at 21-22, contrary to *Graham*'s holding that juvenile nonhomicide offenders sentenced to life imprisonment must have an opportunity "to obtain release *based on demonstrated maturity and rehabilitation*," 560 U.S. at 75 (emphasis added). And the dissent does not dispute that Geriatric Release subjects juvenile offenders, on average, to longer--and proportionately longer--sentences, *post* at 23, contrary to *Graham*'s dictate that state penal regimes account for the lesser culpability of juvenile offenders, 560 U.S. at 76. Nonetheless, the dissent maintains that Petitioner is not entitled to relief because we fail to afford his state court adjudication the level of deference Section 2254(d)(1) requires, as the

Supreme Court interpreted that provision in *Harrington v. Richter*, 562 U.S. 86 (2011). We disagree.

In *Harrington*, the petitioner claimed that his state court adjudication amounted to an unreasonable application of the test for ineffective assistance of counsel set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Harrington*, 562 U.S. at 105. In rejecting the petition, the Supreme Court explained that "[t]he standards created by *Strickland* and § 2254(d) are both 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so. . . ." *Id.* at 105 (quoting *Strickland*, 466 U.S. at 689; *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)).

Notably, *Harrington* further explained that "evaluating whether a rule application was unreasonable [for purposes of Section 2254(d)(1)] requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Court held that the *Strickland* standard "is a general one, so the range of reasonable applications is substantial." *Id.* at 105 (citing *Knowles*, 556 U.S. at 123). This echoes the Court's earlier pronouncement in *Yarborough*, upon which the dissent also relies: "If a legal rule is specific . . . [a]pplications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of

judgment." 541 U.S. at 664; *see post* at 13. Thus, determining whether a state court's decision was "unreasonable" for purposes of Section 2254(d)(1) depends on the specificity of the constitutional rule the state court applied.

A court applying *Strickland* must determine two things: that the defendant's counsel's representation "fell below an objective standard of reasonableness," and that the deficient performance was "prejudicial to the defense." 466 U.S. at 687-91. By contrast, *Graham* set forth a categorical rule barring sentences of life without parole for juvenile nonhomicide offenders. 560 U.S. at 77-79. And *Graham* clearly established that parole or early release programs for such offenders must (1) provide an opportunity to obtain release "based on demonstrated maturity and rehabilitation" and (2) account for the lesser culpability of juvenile offenders. *See supra* Part III.A. The Court characterized these minimum requirements as establishing a "boundar[y]" on state courts' authority to make "case-by-case" sentencing determinations. 560 U.S. at 77. Accordingly, *Graham*'s categorical rule and its minimum requirements for parole or early release programs do not afford state courts the same "leeway" that the "reasonableness" and "prejudice" components of *Strickland* permit. Indeed, the dissent misconstrues *Harrington* when it affords the same "doubly" deferential review to Petitioner's state court adjudication as federal courts apply in reviewing state court decisions applying *Strickland*.

Contrary to the dissent, we do not engage in *de novo* review. Rather, we hold that the Supreme Court of Virginia unreasonably applied *Graham* when it *acknowledged Graham*'s minimum requirements for parole or early release programs for juvenile nonhomicide offenders sentenced to life imprisonment but concluded that Geriatric Release--which permits the Parole Board to deny petitions for Geriatric Release without ever considering a petitioner's maturity or rehabilitation and which treats juvenile offenders *worse* than adult offenders--complied with those requirements.

V.

Nevertheless, Respondents and the dissent seek refuge in Supreme Court's statement that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance" with *Graham*'s requirements. Appellants' Br. at 24, 38, 42-43; *post* at 2. According to Respondents and the dissent, this single sentence effectively immunized Petitioner's sentence--and those of all other juvenile nonhomicide offenders sentenced to life imprisonment eligible for any form of early release other than executive clemency--from collateral review.

But the Supreme Court's proper regard for States' independent judgment regarding how best to operate their penal systems does not, "[e]ven in the context of federal habeas, . . . imply abandonment or abdication of judicial review." *Miller-El v. Cockrell*, 537 U.S. 322,

340 (2003). This is particularly true when, as here, the Supreme Court clearly sets forth minimum constitutional requirements to guide state courts' and policymakers' decisions--requirements that the Supreme Court of Virginia readily determined from the plain language of *Graham*.

In sum, we hold that notwithstanding its recognition of *Graham*'s "governing legal principles," the Supreme Court of Virginia unreasonably concluded that Geriatric Release--a program that predated *Graham* by more than 15 years, that permits the Parole Board to deny release for any reason whatsoever, and that treats juvenile offenders *worse* than adult offenders--complies with *Graham*'s parole requirement. Accordingly, we affirm the district court's decision and remand so that the Petitioner can be resentenced in accordance with *Graham* and the Eighth Amendment.

AFFIRMED

NIEMEYER, Circuit Judge, dissenting:

In affirming the grant of Dennis LeBlanc's habeas petition brought under 28 U.S.C. § 2254, the majority holds that the Virginia Supreme Court concluded unreasonably that Virginia's geriatric release program provided a meaningful opportunity for release to juveniles and therefore satisfied the requirements of *Graham v. Florida*, 560 U.S. 48 (2010). *Graham* forbids sentencing juveniles to life in prison without parole for nonhomicide crimes. In reaching its conclusion, the

majority relies simply on its expressed disagreement with the Virginia Supreme Court's decision in *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), and effectively overrules it. The Virginia court's opinion, however, is demonstrably every bit as reasonable as the majority's opinion in this case and should be given deference under § 2254(d)(1).

After 16-year-old LeBlanc raped a 62-year-old woman in Virginia Beach, Virginia, in 1999, he was convicted in the Virginia Beach Circuit Court of abduction and rape. The court sentenced him in 2003 to life imprisonment on each count. While Virginia had, in 1994, abolished traditional parole for felony offenders, *see* Va. Code Ann. § 53.1-165.1, it had at the same time adopted a "geriatric release" program that allows for the conditional release of inmates who serve at least 10 years of their sentence and reach the age of 60, *see id.* § 53.1-40.01.

In 2010, the U.S. Supreme Court handed down its decision in *Graham*, where it held that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." 560 U.S. at 74. The Court explained that a State must provide this class of juvenile offenders "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," but that "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance." *Id.* at 75.

In its first application of *Graham*, the Virginia Supreme Court held that the factors Virginia applies in

considering candidates for geriatric release were the same as "the factors used in the normal parole consideration process" and that, while Virginia's geriatric release program had "an age qualifier," it nonetheless afforded inmates, including juvenile offenders, "the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment." *Angel*, 704 S.E.2d at 402 (quoting *Graham*, 560 U.S. at 75).

After *Angel* had been decided, LeBlanc filed a motion in the Virginia Beach Circuit Court to vacate his sentence as invalid under *Graham*. The Circuit Court denied his motion, relying on *Angel* to conclude that Virginia had "an appropriate mechanism in place" to enable LeBlanc "to receive some form of parole." But when LeBlanc sought federal habeas relief under 28 U.S.C. § 2254, the district court granted LeBlanc's petition, concluding, contrary to the Virginia court's decision, that Virginia's geriatric release program fell short of *Graham*'s requirements.

In now affirming, the majority unfortunately fails to respect, in any meaningful way, the deference Congress requires federal courts to give to state court decisions on post-conviction review under § 2254. Under even a loose application of the governing standard in § 2254(d), a reviewing federal court would be constrained to conclude that the Virginia Beach Circuit Court's ruling was not contrary to or an unreasonable application of *Graham*. *See* 28 U.S.C. § 2254(d)(1). To hold otherwise would require finding that the Virginia

Supreme Court's decision in *Angel*, as well as the Virginia Beach Circuit Court's decision relying on it, amounted to an "extreme malfunction in the state criminal justice system." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

To reach its conclusion that Virginia's geriatric release program does not provide juveniles with a meaningful opportunity to obtain release, the majority conducts its own *de novo* review of the program, concluding that the program lacks "governing standards" for release. The majority, however, fails to recognize that our task on a § 2254 habeas petition is not to evaluate state parole systems *de novo* but rather to determine whether the Virginia Supreme Court's evaluation of its own program was an unreasonable application of *Graham*, *see* 28 U.S.C. § 2254(d)(1), which it clearly was not. *Graham* held that the Eighth Amendment forbids States from determining, at the time of sentencing, that a juvenile offender who did not commit a homicide "*never* will be fit to reenter society," 560 U.S. at 75 (emphasis added), and that such offenders must have "a chance to demonstrate growth and maturity," *id.* at 73. Analyzing the sufficiency of Virginia's geriatric release program under *Graham*, the Virginia Supreme Court reasonably concluded that the program, which employs the same "factors used in the normal parole consideration process," provides nonhomicide juvenile offenders with "the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth

Amendment." *Angel*, 704 S.E.2d at 402 (quoting *Graham*, 560 U.S. at 75). While the majority may disagree with the Virginia Supreme Court's conclusion, the fact that it was reasonable precludes LeBlanc from obtaining relief under § 2254.

Moreover, beyond this case, the majority's approach will encourage federal courts to scrutinize state policies and parole determinations under similar systems, a result that Congress clearly intended to forestall when it imposed the restrictions stated in § 2254. Indeed, the Supreme Court also sought to avoid this result by explicitly leaving the application of *Graham* to the States. *See Graham*, 560 U.S. at 75 (noting that it is for the State "to explore the means and mechanisms for compliance").

At bottom, when applying the prescribed standards to evaluate the Virginia court's application of *Graham*, it is clear that LeBlanc's petition for a federal writ of habeas corpus must be denied. I now address his petition under those standards.

I

During the morning of July 6, 1999, Dennis LeBlanc, who was at the time 16 years old, asked a 62-year-old woman, who was walking home from a grocery store, for a cigarette. After the woman told him that she did not smoke, LeBlanc pushed her down, dragged her to nearby bushes, raped her, and stole her purse. When police were later able to match LeBlanc's DNA with that of the sperm sample taken from the woman,

LeBlanc was charged and convicted in the Virginia Beach Circuit Court of rape, in violation of Virginia Code § 18.2-61, and abduction with intent to defile, in violation of Virginia Code § 18.2-48. He was sentenced to life imprisonment on each count in March 2003. The court noted that "the two offenses have to be some of the most serious charges I've ever heard about." When imposing life imprisonment, the court did not mention parole, as traditional parole had been abolished in 1994 when the geriatric release program was adopted.* In response to the sentence given, LeBlanc told the court twice, "F--k you."

More than seven years after LeBlanc's sentencing, the Supreme Court decided *Graham*, holding for the first time that "for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of *life without parole*." 560 U.S. at 74 (emphasis added). The Court explained that while "[a] State [was] not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it was required to provide the juvenile offender with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. The Court, however, directed that "[i]t is for the State,

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* The majority claims that LeBlanc was sentenced to "life imprisonment *without parole*," *ante* at 3 (emphasis added), but its statement begs the question. LeBlanc was sentenced simply to life imprisonment, and, at the time, his sentence allowed for the possibility of release under Virginia's geriatric release program, leaving the question whether the program functions as a form of parole.

in the first instance, to explore the means and mechanisms for compliance" with that command. *Id.*

After the *Graham* decision had been handed down, the Virginia Supreme Court considered whether Virginia's geriatric release program satisfied *Graham*'s requirements, and it held that the program did so. *See Angel*, 704 S.E.2d at 402. More specifically, the court explained that Virginia's geriatric release program, as set forth in Virginia Code § 53.1-40.01, allows for the conditional release of inmates when they reach age 60 and have served 10 years and that "the factors used in the normal parole consideration process" apply to such determinations. *Id.* The court concluded that, "[w]hile [the geriatric release program] has an age qualifier, it provides . . . the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment." *Id.* (quoting *Graham*, 560 U.S. at 75).

In May 2011, several months after *Angel* was decided, LeBlanc filed a motion in the Virginia Beach Circuit Court to vacate his life sentence as invalid under *Graham*. He contended that *Angel* was wrongly decided and that he did not indeed have a meaningful opportunity for release. The Circuit Court, however, denied LeBlanc's motion, explaining:

> [The] Supreme Court of Virginia has already looked at this issue in the *Angel* case and determined that there was an appropriate mechanism in place . . . for a defendant to receive some form of parole as enunciated in

> [*Graham*], and they denied Mr. Angel's appeal. . . . The court feels and finds and is so ordering that *there is an appropriate mechanism in place*, that the sentence rendered back in 2003 for Mr. LeBlanc . . . in which the defendant received two life sentences . . . was the appropriate sentence. . . .

(Emphasis added). The Virginia Supreme Court summarily denied LeBlanc's petitions for appeal and for rehearing.

LeBlanc filed this federal habeas petition pursuant to § 2254, contending again that the Virginia Supreme Court had wrongly decided *Angel* and that, based on statistics that he had presented to the state court, he had only a "remote possibility of release," which did not amount to the "meaningful opportunity" for release required by *Graham*. A magistrate judge recommended dismissing LeBlanc's petition, but the district court disagreed and granted the petition, ordering that the Virginia Beach Circuit Court resentence LeBlanc. The district court concluded that "the state court's decision was both contrary to, and an unreasonable application of, clearly established federal law set forth in *Graham*," explaining that "[t]here is no possibility that fairminded jurists could disagree that the state court's decision conflicts with[] the dictates of *Graham*." The court noted further that the geriatric release program "falls far short of the hallmarks of compassion, mercy and fairness rooted in this nation's commitment to justice."

From the district court's judgment, the respondents -- the Commonwealth of Virginia and Randall Mathena, the Warden of Red Onion State Prison (collectively herein, the "Commonwealth" or "Virginia") -- filed this appeal.

II

The operative state court decision for our review is the decision of the Virginia Beach Circuit Court. *See Grueninger v. Dir., Va. Dep't of Corr.*, 813 F.3d 517, 525 (4th Cir. 2016) ("'look[ing] through'" the Virginia Supreme Court's summary refusal to review the defendant's appeal and "evaluat[ing] the Circuit Court's reasoned decision"). That decision concluded that Virginia's geriatric release program provides an "appropriate mechanism" for implementing *Graham*. The Circuit Court relied on the Virginia Supreme Court's opinion in *Angel*, which applied *Graham* and concluded that Virginia's geriatric release program, which uses the "normal" parole factors for determining release, provided "the 'meaningful opportunity to obtain released [sic] based on demonstrated maturity and rehabilitation' required by the Eighth Amendment." *Angel*, 704 S.E.2d at 402 (quoting *Graham*, 560 U.S. at 75).

Faced with the district court's contrary conclusion, we must decide whether the Circuit Court's decision "was contrary to, or involved an unreasonable application of," *Graham*, 28 U.S.C. § 2254(d)(1).

A

First, to satisfy the requirement of § 2254(d)(1) that the state court decision be shown to be "contrary to" *Graham*, LeBlanc would have to show (1) that the state court "applie[d] a rule different from the governing law set forth in [Supreme Court] cases," or (2) that it decided this case "differently than [the Supreme Court] [has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002). Therefore, "a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case would not fit comfortably within [the] 'contrary to' clause." *Williams v. Taylor*, 529 U.S. 362, 406 (2000).

In this case, no one can seriously argue that the Virginia Beach Circuit Court failed to correctly identify *Graham* as stating the applicable legal rule. In denying LeBlanc's motion to vacate his sentence, the Circuit Court specifically discussed *Graham*, noting how "the U.S. Supreme Court in rendering its decision gave the court[s] guidelines to deal with defendants who were juveniles at the time of their offenses." Because the Circuit Court operated under the correct U.S. Supreme Court rules and did not reach an opposite conclusion from the Supreme Court on a question of law, the argument that the Virginia Beach Circuit Court produced a decision "contrary to" *Graham* can survive only if the facts of *Graham* were "materially indistinguishable" from LeBlanc's case. *Bell*, 535 U.S. at 694. But LeBlanc cannot make this showing either.

Graham involved a juvenile offender convicted in Florida for a nonhomicide crime, who was sentenced to life in prison without any possibility of parole. As such, his sentence:

> guarantee[d] he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager [were] not representative of his true character, even if he [were to] spend[] the next half century attempting to atone for his crimes and learn from his mistakes.

560 U.S. at 79. Because Florida had abolished its parole system, the life sentence gave Graham "*no possibility of release* unless he [was] granted executive clemency." *Id.* at 57 (emphasis added). The Court noted, however, that executive clemency provided Graham only a "remote possibility" of release, *id.* at 70, and that Florida had effectively "denied him any chance to later demonstrate that he [was] fit to rejoin society," *id.* at 79. In these circumstances, the Court held that the Eighth Amendment prohibits the imposition of a sentence of life without the possibility of parole for juvenile offenders who commit nonhomicide crimes. *Id.* at 74.

LeBlanc's case differs materially. Unlike Florida law before *Graham*, Virginia's geriatric law affords a juvenile sentenced to life imprisonment some opportunity for release. The geriatric law provides in relevant part:

> Any person serving a sentence imposed upon a conviction for a felony offense . . . who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release. The Parole Board shall promulgate regulations to implement the provisions of this section.

Va. Code Ann. § 53.1-40.01. And the Virginia Supreme Court -- the ultimate authority on Virginia law -- has construed "[t]he regulations for conditional release under [§ 53.1-40.01] [to] provide that if the prisoner meets the qualifications for consideration contained in the statute, *the factors used in the normal parole consideration process apply* to conditional release decisions under this statute." *Angel*, 704 S.E.2d at 402 (emphasis added). Thus, LeBlanc cannot show that the facts in *Graham*, where the prisoner enjoyed no opportunity for release outside of clemency, are materially indistinguishable from the facts of this case, where LeBlanc has an opportunity to be released by the Parole Board.

B

Second, LeBlanc is also unable to demonstrate that the decision by the Virginia Beach Circuit Court, applying *Angel*, was an "unreasonable application of" *Graham*. *See* 28 U.S.C. § 2254(d)(1). To satisfy this requirement, LeBlanc would have to show that, even "if the state court identifie[d] the correct governing legal

principle from [Supreme Court] decisions," it "unreasonably applie[d] that principle to the facts of the . . . case." *Williams*, 529 U.S. at 365. And to show that the state court unreasonably applied governing legal principles, he would have to show that the state court's decision was "'objectively unreasonable,'" rather than "merely wrong" or involving "clear error." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003)).

To emphasize the difficulty of meeting this standard, the Supreme Court has said that a prisoner would have to show "that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103; *see also id.* at 101 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision" (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))). Not surprisingly, the rare decision finding § 2254(d)(1) satisfied typically arises from the misapplication of a long-established Supreme Court standard. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 389 (2005) (finding it was objectively unreasonable for the state court to conclude that, under *Strickland v. Washington*, 466 U.S. 668 (1984), capital defense lawyer's failure to consult prior conviction file that was certain to contain aggravating evidence was not ineffective assistance);

Wiggins v. Smith, 539 U.S. 510, 527-28 (2003) (similar for file containing mitigating evidence).

In this case, after the Virginia Beach Circuit Court correctly identified *Graham* as the governing law, it applied that decision to the facts of LeBlanc's case. In doing so, the Circuit Court considered the *Graham* requirement that States must provide a mechanism that affords a juvenile sentenced to life imprisonment "a meaningful opportunity for release." Since the *Graham* Court stated that its holding applied *only* to juvenile offenders convicted of a nonhomicide crime and sentenced to *life imprisonment without parole*, *Graham*, 560 U.S. at 75, and since the Virginia Supreme Court had held that the geriatric release program employed normal parole factors, the Circuit Court reasonably concluded that LeBlanc's sentence did not violate *Graham*.

Indeed, it strains credulity to conclude that the Circuit Court's application of *Graham* was "so lacking in justification" that it fell "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. For one, *Graham*'s focus on the parallel between life without parole and the death penalty, *see* 560 U.S. at 69-70, along with the Court's indictment of life without parole as impermissibly deeming a "juvenile offender *forever* . . . a danger to society," *id.* at 72 (emphasis added), suggests that the Court saw no constitutional problem with state parole systems that allow for release only later in life. Indeed, the Court emphasized that "[t]he Eighth Amendment does *not* foreclose the possibility that persons convicted of nonhomicide

crimes committed before adulthood will remain behind bars for life. *It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.*" *Id.* at 75 (emphasis added). Thus, the state court was justified in reading *Graham*'s Eighth Amendment concerns as limited to traditional sentences of life without any possibility of parole.

Further, *Graham* did not define the bounds of its singular requirement that a juvenile must have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." 560 [sic] U.S. at 75. Rather, in adopting "[a] categorical rule against life without parole for juvenile nonhomicide offenders," *id.* at 79, *Graham* declined to address what characteristics render a parole or release program "meaningful." The Court did not dictate, for example, how frequently a parole board must meet regarding a juvenile nonhomicide offender or when, after a sentence is imposed on the offender, it must first begin meeting. *Graham* required only that, under a procedure that the Court did not specify, the offender be given a meaningful *opportunity* for release based on demonstrated maturity and rehabilitation. Given *Graham*'s leeway with respect to procedures and decisionmaking, the range of permissible state court interpretation is commensurately broad. *See Yarborough*, 541 U.S. at 664 ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations"). This is for good reason. Federal

courts simply cannot be inserting themselves so deeply into state parole procedures that they effectively usurp the role of a state parole board. *See Vann v. Angelone*, 73 F.3d 519, 521 (4th Cir. 1996) ("It is difficult to imagine a context more deserving of federal deference than state parole decisions").

Affording the proper deference to its interpretation of *Graham*'s broad rule, it is readily apparent that the Virginia Beach Circuit Court operated well within its margin of error in concluding that Virginia's geriatric release program provides a "meaningful opportunity to obtain release." The program includes the Parole Board's review of the inmate's circumstances by considering a range of factors, such as:

- Whether the individual's history, physical and mental condition and character, and the individual's conduct, employment, education, vocational training, and other developmental activities during incarceration, reflect the probability that the individual will lead a law abiding life in the community and live up to all conditions of [geriatric release] if released;
- Length of sentence;
- Facts and circumstances of the offense;
- Mitigating and aggravating factors;
- Inter-personal relationships with staff and inmates; and
- Changes in attitude toward self and others.

Virginia Parole Board Policy Manual 2-4 (Oct. 2006). These factors on their face allow for consideration of an offender's maturity, rehabilitation, and youth at the time of the offense. Further, inmates such as LeBlanc know in advance that the Virginia Parole Board will be considering these factors when it determines geriatric release so that "it is possible to predict, at least to some extent, when [geriatric release] might be granted." *Solem v. Helm*, 463 U.S. 277, 301 (1983). Thus, the Virginia Beach Circuit Court's conclusion, after applying *Angel*, that Virginia's geriatric release law provided the meaningful opportunity to obtain release, certainly was not "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103; *see also id.* at 102 ("It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable"). To hold otherwise would require a finding in effect that the Virginia Beach Circuit Court judge and the Virginia Supreme Court justices failed to meet the definition of "fairminded jurists." *See id.* at 101.

LeBlanc concedes, as he must, that the geriatric release program provides some opportunity for release. He argues, rather, that the opportunity is not meaningful because of the low level of success shown by statistics. The statistics to which he refers, however, provide him with minimal support as they relate to older inmates and do not reflect the outcomes of offenders similarly situated to him. Given that Virginia's parole reforms apply only to felony offenders who committed

their crimes after 1994, juvenile offenders sentenced after 1994 will not gain eligibility for geriatric release for years to come, as they must first reach the age of 60. A 17-year-old juvenile offender who committed a nonhomicide offense in 1995, for example, would not become eligible for geriatric release until 2038. Because of this timing, relevant statistics for juvenile offenders simply do not exist.

I conclude that, just as the Virginia Beach Circuit Court did not rule "contrary to" *Graham*, it also was not an "unreasonable application of" *Graham* to LeBlanc's circumstances within the meaning of § 2254(d)(1).

III

Nonetheless, the majority, for purposes I do not fully understand, engages in an aggressive effort to prop up LeBlanc's claim. To do so, it rests on its unsupported conclusions that Virginia's geriatric release program does not adequately allow for release "based on maturity and rehabilitation"; that it does not account for youth as a mitigating factor; and that it lacks governing standards. Even if the majority's rigorous, *de novo* scrutiny of the Virginia court's reasoning did not defy § 2254(d)'s deferential standard of review, its conclusions are demonstrably mistaken on their own terms.

The majority first claims that Virginia's program fails to provide any consideration for the "special mitigating force of youth," *ante* at 34; *see also ante* at 30-31, and for an inmate's progress with respect to

"maturity and rehabilitation," *ante* at 28-29. Yet, in the very same opinion, it contradictorily quotes the factors that the Parole Board is required to consider in granting release under the program, noting that the Parole Board is to consider "certain" characteristics of the offender, including "'the individual's *history, physical and mental condition and character, . . . conduct*, employment, education, *vocational training*, and *other developmental activities during incarceration*,' prior criminal record, *behavior while incarcerated*, and '*changes in motivation and behavior.*'" *Ante* at 9-10 (emphasis added). Saying that these factors do not account for maturity and rehabilitation flaunts reason. But more importantly, the Virginia Supreme Court's conclusion that Virginia law requires considerations of "normal parole factors" such as rehabilitation and maturity is one of state law and thus is binding on this court. And once it is understood that Virginia law requires consideration of maturity and rehabilitation, it follows that, under the § 2254(d) standard, Virginia's geriatric release program satisfied *Graham*.

Second, the majority's conclusion that the Virginia program lacks "governing standards" for release is puzzling in light of the majority's own description of the Virginia program, which includes a detailed description of the relevant standards:

> The Geriatric Release Administrative Procedures set forth a two-stage review process for Geriatric Release petitions. [*Id.*] At the "Initial Review" stage, the Parole Board reviews a prisoner's petition -- which must

provide "compelling reasons for conditional release" -- and the prisoner's "central file and any other pertinent information." J.A. 287. The Parole Board may deny the petition at the Initial Review stage based on a majority vote. [*Id.*] Neither the statute nor the Geriatric Release Administrative Procedures states what constitute "compelling reasons for conditional release" nor does either document set forth any criteria for granting or denying a prisoner's petition at the Initial Review stage. [*Id.*]

If the Parole Board does not deny a petition at the Initial Review stage, the petition moves forward to the "Assessment Review" stage. [*Id.* at 288] As part of the Assessment Review, a Parole Board member or designated staff member interviews the prisoner. [*Id.*] During that interview, the prisoner may present written and oral statements as well as any written material bearing on his case for parole. *The interviewer then drafts a written assessment of the prisoner's "suitability for conditional release" and, based on that assessment, recommends whether the Parole Board should grant the petition*. J.A. 288. In order to grant geriatric release to a prisoner sentenced to life imprisonment, at least four members of the five-member Parole Board must vote in favor of release. [*Id.*]

In engaging in the Assessment Review, Parole Board members should consider "[a]ll factors in the parole consideration process

> including Board appointments and Victim Input." *Id. The Virginia Parole Board Policy Manual includes a long list of "decision factors" to be considered in the parole review process.* J.A. 297. These factors include: public safety, the facts and circumstances of the offense, the length and type of sentence, and the proposed release plan. [J.A. 297-99.] *The Parole Board also should consider certain characteristics of the offender, including* "the individual's history, physical and mental condition and character, . . . conduct, employment, education, vocational training, and other *developmental activities during incarceration," prior criminal record, behavior while incarcerated, and "changes in motivation and behavior."* J.A. 297-99. Finally, the Parole Board should consider impressions gained from interviewing the prisoner as well as information from family members, victims, and other individuals. [J.A. 300.]

Ante at 8-10 (emphasis added; brackets in original).

The majority's effort to bypass the "governing standards" that it quotes is, in essence, an argument that the Parole Board may not deny release without considering the juvenile offender's maturity and rehabilitation and that the Parole Board *must*, on each application for release, explicitly consider maturity and rehabilitation, regardless of what is presented in the application. This argument, however, reads into *Graham* far more than the case actually holds. *Graham* does not dictate parole board procedures and decisionmaking. And, more particularly, it does not limit

the permissible factors for denying release. Rather, it requires that the juvenile offender be given an *opportunity* for release based on "*demonstrated* maturity and rehabilitation," imposing the burden on the juvenile offender to present evidence of maturity and rehabilitation and in turn requiring that the parole board have an *ability* to consider that evidence in deciding whether the offender should be released. Within this structure, therefore, when the Virginia Parole Board is presented with a juvenile offender's application that makes a showing of maturity and rehabilitation, the Board is authorized, on the stated factors under which it operates, to grant release. This is just the meaningful opportunity that the Supreme Court describes in *Graham*. And *Angel* thus properly held that the Virginia Geriatric Release factors provide that ability to grant release on demonstrated maturity and rehabilitation, particularly in stating that the Parole Board should consider the juvenile offender's developmental activities during incarceration, his behavior while incarcerated, and the changes in his motivation and behavior.

Stated otherwise, under the majority's view, to satisfy *Graham* a State would have to consider *only* the *Graham* factors in considering release, denying the Parole Board the opportunity to consider any of the non-*Graham* factors that might be relevant to the juvenile offender's application for release and the Board's decision on that application. That aggressive reading of *Graham* would, I think, surprise the Supreme Court that decided it. But more importantly, it certainly was not unreasonable for the Virginia Circuit Court to

understand *Graham* as not mandating the precise factors that every parole board must consider when reviewing juvenile offenders' applications for release.

The majority also faults the geriatric release program because it allows for longer sentences to juveniles than adults, relying simply on the fact that juveniles commit their crimes earlier in life. *See ante* at 21, 34-35. It is a reality that a person who commits a serious crime at age 35 or, indeed, as a juvenile, will have the possibility of serving more years in prison than a person who commits the same crime at age 62. But if that reality violates *Graham*, it is hard to see how any term-of-years sentence for a juvenile could withstand Eighth Amendment scrutiny; a young person's chances of serving a full sentence are inherently higher than an older person's.

Finally, the majority surmises that the Virginia Supreme Court in *Angel* expected that Angel would spend the rest of his life in jail and that therefore the court's application of *Graham* was unreasonable because this observation implied that early release would be "the exception, rather than the expectation." *Ante* at 31. This ground for attacking the Virginia Supreme Court can rest only on wild speculation, as no juvenile offender has yet been processed under the State's geriatric release program, and the majority has pointed to no data to predict how the Parole Board will decide applications of juveniles for early release when they first qualify. *Graham* did not require that juveniles be released at any given time; it required that the juveniles be given a meaningful opportunity to prove themselves and to persuade the Parole Board to grant

them release. If the Parole Board is given that authority by law, as the Virginia court found it is, then *Graham* is satisfied.

In short, the majority has reviewed *de novo* Virginia's parole criteria based on its own expectations of how the system *might* work and has failed to appreciate that our sole task on a § 2254 petition is to determine whether the Virginia Supreme Court's decision in applying *Graham* was unreasonable. And in fulfilling the task given by § 2254, it is not sufficient to show simply that the Virginia Supreme Court was wrong or even committed clear error; rather, it must be shown that the court erred in a manner "well understood and comprehended in existing law," such that its error was "beyond any possibility for fairminded disagreement." *See White*, 134 S. Ct. at 1702 (quoting *Harrington*, 562 U.S. at 103).

* * *

Because of the limitations of the Supreme Court's holding in *Graham*, the directly relevant holding by the Supreme Court of Virginia in *Angel*, and the restrictions imposed by § 2254(d), we are simply not free to grant LeBlanc's habeas petition. Unfortunately, the majority, in its adventuresome opinion, pays only lip service to the required standards of review. Were it to have applied them meaningfully, I submit, the judgment of the district court granting LeBlanc his habeas petition would have to be reversed and the case remanded with instructions to dismiss the petition.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: AUGUST 9, 2011
JUDGE: H. THOMAS PADRICK

COMMONWEALTH OF VIRGINIA
vs.
DENNIS ROBERT LEBLANC

CONVICTION FOR:
ABDUCTION WITH INTENT TO DEFILE
RAPE

ORDER-CASE NO.:CR02-1515

Court reporter: Fiduciary Reporting, Inc.

This day came T. Murphy and K. Orsini, attorneys for the Commonwealth, the defendant, appeared by video, and J. Stanton and M. Shapiro, attorneys for the defendant.

After hearing evidence and argument of counsel, the court denied defendant's motion to vacate sentence on all grounds for the reasons stated on the record.

ENTERED: 8-9-2011

/s/ H. Thomas Padrick
JUDGE

Clerk: nh/cd

VIRGINIA: CIRCUIT COURT OF THE
CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA	)	
	)	RECORD
	)	CR99-4803
v	)	CR02-1515
DENNIS ROBERT LEBLANC,	)	
Defendant.	)	

Before Hon. H. Thomas Padrick, Jr., judge
Virginia Beach, Virginia
August 9, 2011

APPEARANCES: Commonwealth's Attorney's Office
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Equal Justice Initiative
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(Ms. Jennifer T. Stanton),
attorneys for the defendant.

[155] THE COURT: All right. The court received these motions several months ago; and when the U.S. Supreme Court had come out with this case, I didn't even remember that I had actually sentenced a juvenile to life in prison, juvenile at the time of the offenses. So when I got the file, I looked and then I remembered this one. I should have remembered it because of how serious it was and the court felt that

the defendant was an extreme danger to society. And I was just looking at his presentence report. Before he came to me, he had been convicted of carjacking, abduction, robbery, use of a firearm in the commission of a felony in Norfolk, Chesapeake, another robbery in Chesapeake, three counts of robbery in Virginia Beach, three counts of use of a firearm in commission of a felony, and all those were pending or had been resolved. This case was not only sad but it was tragic for the woman who was raped because, as I said, she was just an elderly lady walking down a path and the defendant raped her and abducted her. The -- and then the court at the time prior to sentencing had a [156] psychosexual evaluation done, and basically the psychologist said he was a sociopath in so many words. So based on the totality of that, the court gave him a life sentence. That was back in 2003. And just as an aside, of course, I know it's not a pleasant thing to get a life sentence, but the last thing the defendant told me was, Fuck you, quote/unquote twice. So I just let it go because, you know, he just got a life sentence; but that was what I was dealing with then.

The U.S. Supreme Court in rendering its decision gave the court's guidelines to deal with defendants who were juveniles at the time of their offenses, and I believe the defendant was sixteen at the time the -- of the -- of this particular offense. I don't know how old he was when he committed these robberies and other things that were going on back then. And, as I said, by the time the court got him, he was nineteen years old or twenty. I don't recall. And the court looked at the

totality of the evidence and sentenced him to two counts -- excuse me -- two life sentences; and the court's always looking for guidance as to what to do in these situations because the U.S. Supreme Court, to my knowledge, had never issued a ruling such as that except, I believe, you know, you can't execute juveniles. That was several [157] years before. So they're kind of expanding their jurisprudence in regard to juvenile sentences.

But the court can't ignore two things, among others. Number one, the Supreme Court -- the Virginia Supreme Court -- or Supreme Court of Virginia has already looked at this issue in the Angel case and determined that there was an appropriate mechanism in place for the -- for a defendant to receive some form of parole as enunciated in the U.S. Supreme Court case, and they denied Mr. Angel's appeal. I suspect that's probably pending in front of the U.S. Supreme Court at the moment since the Virginia Supreme Court came out with this decision in January.

The court feels and finds and is so ordering that there is an appropriate mechanism in place, that the sentence rendered back in 2003 for Mr. Leblanc in which -- in which the defendant received two life sentences was the appropriate -- was the appropriate sentence; and the court feels consequently, in review of the -- of the case law and the case itself, that under Rule 1:1 of the Supreme Court of Virginia Rules the court does not have jurisdiction to hear the matter. The sentence is not void ab initio. The court's going to deny the motion to reconsider, and your exception is noted.

[158] All right. Do you want to go ahead and preserve some of these objections so that you will have a record?

MR. SHAPIRO: Yes, Your Honor. One second, if I may.

THE COURT: All right.

MR. SHAPIRO: Your Honor, just if I may, certainly, we take exception to the court's ruling under the Eighth Amendment. Our position, again, is that the Geriatric Release Program does not offer the kind of safety value that Graham envisioned. This court has jurisdiction over Mr. Leblanc's case because his sentence is unconstitutional and that the motion to vacate is properly before the court. And just to follow up on that, Your Honor, we actually have submitted a motion to declare Mr. Leblanc indigent, and we would just ask the court for a ruling on that motion.

THE COURT: The court's going to deny that motion. The court feels that the court doesn't have jurisdiction to grant it.

All right. Anything else?

Okay. All right. Thank you.

MR. SHAPIRO: Your Honor, sorry. If I -- if I may ask, can I just note the exception to that, [159] the ruling on the certificate of indigency?

THE COURT: Okay. All right. Thank you. Your exception's noted.

MR. SHAPIRO: Thank you, Your Honor.

THE COURT: All right. All right. Mr. Leblanc, we're done. Thank you.

THE DEFENDANT: Thank you, Your Honor.

(The hearing concluded at 10:01 a.m.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 13th *day of* April, 2012.

Dennis Robert LeBlanc, Appellant,

against Record No. 111985
Circuit Court No. CR02-1515

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: /s/ [Illegible]
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DENNIS LeBLANC, Petitioner, v. RANDALL MATHENA, Chief Warden, Red Onion State Prison, Pound, Virginia, and COMMONWEALTH OF VIRGINIA, Respondents.	Case No.: 2:12-cv-340

REPORT AND RECOMMENDATION

Before the Court is the Petitioner's, Dennis LeBlanc ("LeBlanc"), Petition for a Writ of *Habeas Corpus* filed pursuant to 28 U.S.C. § 2254 ("Petition"), ECF No. 1, and the Respondents' Motion to Dismiss, ECF No. 17. After being fully briefed, the Motion was referred for disposition to the undersigned U.S. Magistrate Judge ("undersigned") pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), Federal Rule of Civil Procedure 72(b), Local Civil Rule 72, and the April 2, 2002, Standing Order on Assignment of Certain Matters to United States Magistrate Judges. After reviewing the briefs, the undersigned disposes of the Motion on the papers without a hearing pursuant to Federal Rule of Civil Procedure 78(b) and Local Civil Rule 7(J). For the following reasons, the undersigned **RECOMMENDS**

the Respondents' Motion to Dismiss, ECF No. 17, be **GRANTED** and LeBlanc's Petition, ECF No. 1, be **DENIED** and **DISMISSED WITH PREJUDICE**.

I. FACTUAL AND PROCEDURAL BACKGROUND

LeBlanc was convicted in 2002 by a Virginia state trial court of rape and abduction with intent to defile and sentenced a year later to life in prison on each offense. These convictions and sentences were never directly appealed. Because these offenses occurred in 1999 when LeBlanc was sixteen, he is ineligible for parole. VA. CODE ANN. § 53.1-165.1 ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."). Pursuant to Virginia Code § 53.1-40.01 ("geriatric release statute"), however, LeBlanc may apply for conditional release after turning sixty. *See id.* § 53.1-40.01 ("Any person serving a sentence imposed upon a conviction for a felony offense . . . who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.").

On May 17, 2010, the U.S. Supreme Court held in *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010), that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide," *id.* at ___, 130 S. Ct. at 2034. And if a state "imposes a sentence of life it must provide [such offender] with some realistic opportunity

to obtain release before the end of that term." *Id.* Following this ruling, on May 11, 2011, LeBlanc moved to vacate his sentences in the Virginia state trial court that had convicted and sentenced him, arguing that "[b]ecause [he] was sixteen years old at the time of the offense and did not commit a homicide, *Graham* renders his sentence unconstitutional under the Eighth Amendment," especially in light of the allegedly "remote possibility of release" under Virginia's geriatric release statute. ECF No. 18, attach. 7 at 11, 13. After conducting an evidentiary hearing on August 9, 2011, the court, that day, denied the motion. LeBlanc timely appealed to the Virginia Supreme Court on November 9, 2011, asserting that "[t]he trial court erred by finding that Virginia's [geriatric release statute] saves what would otherwise be [an] unconstitutional sentence of life without parole for a non-homicide crime he committed at sixteen years of age." *Id.*, attach. 1 at 6. After oral argument, the Supreme Court refused the appeal on April 13, 2012, finding no reversible error,[1] and denied LeBlanc's timely petition for rehearing on June 15, 2012.

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[1] The undersigned proceeds on the logical assumption that one of the reasons the Virginia Supreme Court refused LeBlanc's appeal, finding no reversible error, is because the question presented there had been raised and decided in a previous case, *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011). Thus, although *Angel* is not explicitly mentioned in the Supreme Court's order refusing LeBlanc's appeal, that case, reviewed in the context of 28 U.S.C. § 2254(d)(1), effectively controls the disposition of this matter.

Four days later, on June 19, 2012, LeBlanc filed the instant § 2254 Petition, his first. The question presented is whether the Virginia Supreme Court's holding in *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), that Virginia's geriatric release statute provides nonhomicide juvenile offenders sentenced to life in prison without parole a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation,'" *id.* at 402, is contrary to or an unreasonable application of the Eighth Amendment as interpreted in *Graham*. CONST. amend. VIII ("[C]ruel and unusual punishments [shall not be] inflicted."); 28 U.S.C. § 2254(d)(1) ("An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"); *Graham*, 560 U.S. at ___, 130 S. Ct. at 2024 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. . . . [I]f [a state] imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term."); *id.* at ___, 130 S. Ct. at 2030 ("A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants . . . some meaningful opportunity to obtain

release based on demonstrated maturity and rehabilitation."). Although LeBlanc generally requests the Court "[i]ssue a writ of *habeas corpus* granting [him] relief from his unconstitutional sentence," ECF No. 1 at 8, the undersigned presumes that should *Angel* be found to be contrary to or an unreasonable application of clearly established federal law, then the matter must be remanded to the Virginia state trial court for new sentencing in compliance with the Eighth Amendment as interpreted in *Graham*.

The Virginia Attorney General, on behalf of the Respondents, filed a Rule 5 Answer, Motion to Dismiss, and brief in support on November 15, 2012. ECF Nos. 16-18. After the time to file a response and brief in opposition lapsed, the Court, on April 30, 2013, ordered LeBlanc to respond to the Respondents' Motion to Dismiss, finding that additional briefing by the parties would aid the decisional process. ECF No. 20. LeBlanc did so on May 13, 2013. ECF No. 21. The Respondents have not filed a reply brief, and the time to do so has lapsed. Therefore, the Motion is ripe for disposition.

II. PROCEDURAL ISSUES

A. Exhaustion

Section 2254 petitions challenge a state's custody of a prisoner "on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "In the interest of giving the state courts the first opportunity to consider alleged constitutional errors occurring in a state

prisoner's trial and sentencing, a state prisoner must exhaust all available state remedies before he can apply for federal *habeas* relief." *Breard v. Pruett*, 134 F.3d 615, 618 (4th Cir. 1998) (citing 28 U.S.C. § 2254(b); *Matthews v. Evatt*, 105 F.3d 907, 910-11 (4th Cir. 1997)). "To exhaust state remedies, a *habeas* petitioner must fairly present the substance of his claim to the state's highest court." *Id.* (citing *Matthews*, 105 F.3d at 911). In Virginia, that court is the Virginia Supreme Court. "The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal *habeas* petition." *Id.* (citing *Matthews*, 105 F.3d at 911). "The burden of proving that a claim is exhausted lies with the *habeas* petitioner." *Id.* (citing *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994)).

Although neither party addresses exhaustion in their briefs, the undersigned nonetheless finds that LeBlanc has exhausted his available state remedies for the purpose of federal *habeas* review. Specifically, LeBlanc collaterally attacked his sentence by filing with the Virginia state trial court that sentenced him a motion to vacate invalid sentence, which is permitted under Virginia law. *See Rawls v. Commonwealth*, 683 S.E.2d 544, 547 (Va. 2009) ("Th[e] [Virginia Supreme] Court has recognized that a motion to vacate is an appropriate procedural device to challenge a void conviction. . . . A circuit court may correct a void or unlawful sentence at any time.") (citations omitted). After losing in the state trial court, LeBlanc properly and timely appealed to the Virginia Supreme Court, which also

denied him relief. Because the question presented in LeBlanc's Petition is the same one that was put before the Virginia Supreme Court and state trial court, exhaustion has been met, and federal *habeas* review is appropriate here. Notwithstanding exhaustion, however, the Respondents assert that LeBlanc's claim is time-barred, and therefore, his Petition should be denied and dismissed.

B. Statute of Limitations

Section 2254 petitions are subject to a one-year statute of limitations that begins to run from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" or "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[2] 28 U.S.C. § 2244(d)(1)(A), (C). According to the Respondents, LeBlanc's Petition is time-barred because he should have, but did not, file it by March 4, 2004, one year from March 4, 2003, the date he was sentenced. LeBlanc, however, asserts that the limitation period began to run on May 17, 2010, the date the U.S. Supreme Court

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[2] 28 U.S.C. § 2244(d)(1)(B) and (D), which address other means by which to calculate the one-year statute of limitations, are not applicable and will not be discussed here.

decided *Graham*.[3] Excluding the fact that, contrary to the Respondents' argument, LeBlanc's judgment became "final" under 28 U.S.C. § 2244(d)(1)(A) on April 3, not March 4, 2003, when the thirty days to note an appeal from the Virginia state trial court to the Virginia Court of Appeals expired, the undersigned concurs with LeBlanc's assessment and finds that his Petition was timely filed. *See* VA. SUP. CT. R. 5A:6(a) ("No appeal shall be allowed unless, within 30 days after entry of final judgment or other appealable order or decree . . . counsel files with the clerk of the trial court a notice of appeal."); *United States v. Clay*, 537 U.S. 522, 527 (2003) ("Finality attaches when[, *inter alia*,] the time for filing a certiorari petition expires.") (citations omitted); *Smith v. Clarke*, 7:13-cv-00059, 2013 WL 866077, at *1 (W.D. Va. Mar. 7, 2013) ("Petitioner's conviction became final . . . when the time expired for petitioner to note an appeal from the Circuit Court . . . to the Court of Appeals of Virginia.") (citation omitted).

In *In re Evans*, 449 F. App'x 284 (4th Cir. 2011) (unpublished *per curiam* decision), the U.S. Court of Appeals for the Fourth Circuit granted a petitioner's[4] motion for authorization to file a second or successive § 2254 petition pursuant to 28 U.S.C. §§ 2244(b)(2)(A), (b)(3), and 2255(h)(2). It did so because the petitioner

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[3] Although the U.S. Supreme Court modified its decision in *Graham* on July 6, 2010, it matters not for calculating the limitation period because the undersigned finds LeBlanc's Petition was timely filed even under the earlier initial decision date of May 17, 2010.

[4] The petitioner was a nonhomicide juvenile offender sentenced to life in prison without parole.

"ha[d] made a 'prima facie showing' that his 'claim [of an unconstitutional sentence] relie[d] on a new rule of constitutional law, [*i.e., Graham*,] made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'" *In re Evans*, 449 F. App'x at 284 (citation omitted). Although the U.S. Government there "properly acknowledged that in the appropriate case *Graham* establishes a previously unavailable rule of constitutional law that applies retroactively on collateral review," it also argued that *Graham* did not apply in that case because one of the petitioner's offenses occurred when he was an adult. *Id.* (citation omitted). Despite the fact that the Fourth Circuit's decision, which is unpublished, only has persuasive value, not precedential authority, the undersigned finds no reason to disturb or depart from the only case from this Circuit that addresses whether *Graham* announced a new rule of constitutional law that was previously unavailable and whether that rule has been made retroactive to cases on collateral review by the U.S. Supreme Court. Other circuits have reached a similar conclusion. *See In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) ("First, *Graham* set out a new rule of constitutional law that was not previously available. . . . Second, [the petitioner] ha[d] made a *prima facie* showing that *Graham* has been made retroactively applicable by the Supreme Court to cases on collateral review.") (citation omitted); *In re Sparks*, 657 F.3d 258, 260 (5th Cir. 2011) (same) (footnote omitted); *Goins v. Smith*, No. 4:09-CV-1551, 2012 WL 3023306, at *5 (N.D. Ohio July 24, 2012) (same). If the Fourth Circuit did not intend in *Evans* to declare *Graham* to

be retroactive, then that issue is best left to that Court to resolve. For the purpose of the analysis here, however, the undersigned calculates the applicable limitation period pursuant to 28 U.S.C. § 2244(d)(1)(C), not § 2244(d)(1)(A).

Accordingly, the limitation period on the claim presented in LeBlanc's Petition began to run on May 17, 2010, the date *Graham* was decided. This period continued to run for 359 days until, as the Respondents acknowledge, it was tolled during the pendency of LeBlanc's motion to vacate from May 11, 2011, when the motion was filed in a Virginia state trial court, to June 15, 2012, when the Virginia Supreme Court denied his petition for rehearing. *See* 28 U.S.C. § 2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."); *Terry v. Kelly*, No. 3:10CV635, 2011 WL 1637943, at *2 (E.D. Va. Apr. 28, 2011) ("Pursuant to 28 U.S.C. § 2244(d)(2), the limitation period was tolled . . . until the Supreme Court of Virginia denied [the petitioner's] petition for rehearing on his state *habeas corpus* petition"); ECF No. 18, ¶ 7 ("The statute of limitations was tolled during the pendency of the state court proceedings."). The limitation period resumed thereafter for an additional four days, for a total of 363 days, until LeBlanc filed his Petition on June 19, 2012. Because only 363 days elapsed after the one-year statute of limitations began to run, LeBlanc's Petition was

timely filed. The undersigned, therefore, turns to the merits.

III. STANDARD OF REVIEW

Although the Virginia Supreme Court refused LeBlanc's appeal in a two-sentence decision, this brief decision in which it found no reversible error in the Virginia state trial court's denial of LeBlanc's motion to vacate constitutes an adjudication on the merits, and the parties do not appear to contest this characterization. *See Bell v. Jarvis*, 236 F.3d 149, 163 (4th Cir. 2000) (*en banc*) ("[Courts] must uphold the state court's summary decision unless [their] independent review of the record and pertinent federal law persuades [them] that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented.") (citations omitted); *Renoir v. Virginia*, No. 7:99-CV-00580-JLK, 2001 WL 34801301, at *8 n.7 (W.D. Va. July 31, 2001) (holding Virginia Supreme Court adjudicated claim on the merits where it found "no reversible error in the judgment complained of"). When a state court addresses the merits of a claim that is raised in a § 2254 petition, the Court may not grant federal *habeas* relief on that claim unless, *inter alia*, the state court decision is contrary to or an unreasonable application of clearly established federal law.[5] 28 U.S.C. § 2254(d)(1). The Court

[5] The standard of review contained in 28 U.S.C. § 2254(d)(2) is not applicable and will not be discussed here.

independently reviews whether that decision satisfies either standard. *See Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court decision is "contrary to" clearly established federal law if the state court "arrives at a conclusion opposite to that reached by th[e] [U.S. Supreme] Court on a question of law or if the state court decides a case differently than th[e] [Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 413. As to whether a state court decision is an "['objectively'] unreasonable application" of clearly established federal law, the state court must "identif[y] the correct governing legal principle from th[e] [Supreme] Court's decisions but unreasonably appl[y] that principle to the facts of the prisoner's case." *Id.* at 410. Ultimately, though, "state-court judgments must be upheld unless, after the closest examination of the state-court judgment, a federal court is *firmly convinced* that a federal constitutional right has been violated." *Id.* at 389 (emphasis added). It is the Court's obligation to focus "on the state court decision that previously addressed the claims rather than the petitioner's freestanding claims themselves." *McLee v. Angelone*, 967 F. Supp. 152, 156 (E.D. Va. 1997).

IV. ANALYSIS

The thrust of LeBlanc's Petition is that the Virginia Supreme Court's holding in *Angel* that Virginia's geriatric release statute provides nonhomicide juvenile offenders sentenced to life in prison without parole with a "'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation'"

is contrary to or an unreasonable application of the Eighth Amendment as interpreted in *Graham*. *Angel*, 704 S.E.2d at 402. To ascertain the accuracy of this claim, the undersigned begins with a review of *Angel*, to which, notably, the U.S. Supreme Court denied a petition for a writ of *certiorari*. *Angel v. Virginia*, 132 S. Ct. 344 (2011).

A. *Angel v. Commonwealth*

In *Angel*, the defendant, who was a juvenile when he committed certain nonhomicide offenses,[6] was given consecutive sentences of twenty years, twelve months, and three terms of life in prison without parole. After the Virginia Court of Appeals affirmed his convictions and sentences,[7] the defendant appealed to the Virginia Supreme Court, raising six assignments of error, including, *inter alia*, "that his three consecutive life sentences for nonhomicide crimes, without parole, should be vacated" in light of *Graham*. *Angel*, 704 S.E.2d at 391. Although LeBlanc received only two consecutive life sentences without parole, compared to the defendant's three, he asserts the same claim in his Petition as the defendant did in *Angel*, namely, that it is

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[6] The defendant was convicted in a Virginia state trial court of malicious wounding, abduction with intent to defile, and object sexual penetration (two counts), all felonies, as well as misdemeanor sexual battery.

[7] The Virginia Court of Appeals did not have the occasion to review the defendant's sentences for compliance with *Graham*. The Virginia Supreme Court nonetheless included this assignment of error when awarding the defendant an appeal.

unconstitutional to sentence nonhomicide juvenile offenders to life in prison in Virginia, which has eliminated parole, because the geriatric release statute does not provide such offenders with a realistic and meaningful opportunity for release required under the Eighth Amendment as interpreted in *Graham*.

In rejecting this claim, the Virginia Supreme Court distilled the correct and central holding of *Graham*: "the Eighth Amendment[] '[p]rohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. . . . [I]f it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.'" *Id.* at 401 (quoting *Graham*, 560 U.S. at ___, 130 S. Ct. at 2034). However, as the Supreme Court properly qualified,

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give [nonhomicide juvenile offenders] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. It is for the State, *in the first instance*, to explore the means and mechanisms for compliance. . . . [The Eighth Amendment] does not require the State to release that offender during his natural life.

Id. at 401-02 (quoting *Graham*, 560 U.S. at ___, 130 S. Ct. at 2030) (emphasis added). In determining the reach of *Graham*, the Supreme Court resolved that

states may "devise methods of allowing juvenile offenders an opportunity for release based on maturity and rehabilitation." *Id.* at 402. One such method in Virginia is the geriatric release statute, which provides prisoners, who are ineligible for parole based on the date of their offense, *see* VA. CODE ANN. § 53.1-165.1, with the opportunity to apply for conditional release after their sixtieth or sixty-fifth birthday, depending on whether they have served at least ten or five years of their sentence, respectively, *id.* § 53.1-40.01. It is the opinion of the Virginia Supreme Court that this mechanism provides nonhomicide juvenile offenders sentenced to life in prison without parole with a realistic and meaningful opportunity for release required under the Eighth Amendment as interpreted in *Graham*. *See Angel*, 704 S.E.2d at 402.

And the Court may not review a claim raised in a § 2254 petition unless, *inter alia*, the state court decision addressing that claim is contrary to or an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). The operative phrase, "clearly established federal law," means "the holdings, as opposed to the dicta, of th[e] [U.S. Supreme] Court's decision as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. To identify the central holding of *Graham*, one must turn to the last paragraph of the majority's opinion:

> The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual

> release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

Graham, 560 U.S. at ___, 130 S. Ct. at 2034. By this holding, the U.S. Supreme Court has clearly established that a nonhomicide juvenile offender, like LeBlanc, sentenced to life in prison without parole, at first blush, has been sentenced unconstitutionally if he has no realistic opportunity to obtain release before the end of his term. The parties do not appear to contest this point. What is less clearly established and the source of the parties' contention, however, is the denotation of the phrase, a meaningful and realistic opportunity for release.

B. Statistical Data and Parallels to Executive Clemency

In *Graham*, the U.S. Supreme Court held that executive clemency, as the sole mechanism by which a nonhomicide juvenile offender sentenced to life in prison without parole may be released, does not provide a meaningful and realistic opportunity for release because it offers only "the remote possibility of [release and] does not mitigate the harshness of the sentence."[8]

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[8] Although executive clemency is available to Virginia prisoners, *see* VA. CONST. art. 5, § 12; VA. CODE ANN. §§ 19.2-363, 53.1-229, this is not the only mechanism by which nonhomicide juvenile offenders sentenced to life in prison without parole may be released. Because executive clemency was the sole mechanism by which the

Id. at ___, 130 S. Ct. at 2027 (citing *Solem v. Helm*, 463 U.S. 277, 300-01 (1983)). The question, therefore, is whether Virginia's geriatric release statute, which provides prisoners like LeBlanc with the opportunity to apply on a known future date for conditional release, and which sounds in parole but is not referred to as such, provides a meaningful and realistic opportunity for release. LeBlanc answers in the negative, arguing that the (remote) possibility of release under the geriatric release statute is the same as under executive clemency. Although LeBlanc does not include in his exhibits information concerning executive clemency in Virginia so as to make a sound analogy to the geriatric release statute, such data is unnecessary to resolve the present question: whether Virginia's geriatric release statute provides a realistic and meaningful opportunity for release of nonhomicide juvenile offenders sentenced to life in prison without parole.

Between 2001 and 2010, the number of prisoners for which Virginia was responsible who were eligible to apply for geriatric release increased from 247 to 669, and was projected to increase to 805 in 2011 and to 962 in 2012. ECF No. 19, attach. 1 at 103, 106. Although there is no reason to challenge the accuracy of these figures, some clarification is warranted. In 2001, the phrase, "committed on or after January 1, 1995," was deleted from the geriatric release statute, S.B. 1167, 2001 Leg. Reg. Sess. (Va. 2001), thereby expanding eligibility for geriatric release to all prisoners, including

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defendant in *Graham* could have been released, the parallels between that case and this one are diminished.

those who were sentenced under the parole system ("parole-system inmates"), not just those like LeBlanc who were sentenced under the truth-in-sentencing system ("truth-in-sentencing inmates"), when parole was abolished. ECF No. 19, attach. 1 at 39, 64, 102. However, prisoners who are eligible for parole *and* geriatric release do not get "two bites at the apple": they may be considered for parole, which is automatic, *or* they may apply for geriatric release, but they may not be [sic] proceed under both in a given year. *Id.*, attach. 1 at 41, 75.

Given this background, the above data offers an altogether different perspective. In 2010, the number of prisoners who were eligible to apply for geriatric release, 669, included a substantial number of parole-system inmates, 489, and a significantly smaller set, 180, of truth-in-sentencing inmates like LeBlanc. *Id.*, attach. 1 at 76, 103. The last figure is indicative of the "relatively small number of offenders sanctioned under truth-in-sentencing laws [who] have qualified for geriatric release consideration," which in 2001 was only 19. *Id.*, attach. 1 at 103. Although the number of prisoners who were eligible to apply for geriatric release increased from 359 to 669 between 2004 and 2010, less than one-fifth of those eligible actually applied: 39 (11%) in 2004 and 129 (19.2%) in 2010. *Id.*, attach. 1 at 105. Of those applicants, geriatric release was granted to two prisoners in 2004 and eight in 2010. *Id.*, attach. 1 at 105.

On its face, the number of prisoners who were eligible, applied for, and granted geriatric release—two in

2004 and eight in 2010—substantiates LeBlanc's claim that Virginia's geriatric release statute is akin to executive clemency in that it provides only a remote, but not a meaningful and realistic, opportunity for release. Upon closer inspection, however, the above data is only thought-provoking, but it is neither persuasive nor dispositive in answering the question presented. To begin, the fact that "[f]ew eligible inmates have applied to be considered for geriatric release," *id.*, attach. 1 at 78, cautions against issuing a broad declaration that the geriatric release statute as it applies to a nonhomicide juvenile offender who is sentenced to life in prison without parole violates the Eighth Amendment as interpreted in *Graham*. The above data, moreover, illustrates that just as the number of prisoners who were eligible and applied for geriatric release rose between 2004 and 2010, those who were granted such release also rose between those years. *Id.*, attach. 1 at 105. Although LeBlanc does not provide actual data for 2011 and 2012, it is logical to assume that these figures likewise rose in the preceding two years and will continue to rise in 2013 and after as the number of parole-system inmates decreases. *See id.*, attach. 1 at 78 ("[F]ew eligible inmates have applied to be considered for geriatric release. . . . This is most likely because the majority of inmates eligible for geriatric release are also eligible for discretionary parole release."). Depending on the validity of this assumption, the parallel LeBlanc creates between executive clemency and Virginia's geriatric release statute either fails (the number of prisoners granted geriatric release continues to rise) or succeeds (this number freezes or decreases).

A more startling and significantly apparent omission from the preceding data is that it does not address juvenile offenders like LeBlanc who were sentenced under the truth-in-sentencing system. Regardless at what age Virginia distinguishes juvenile offenders from adults, *see* VA. CODE ANN. §§ 16.1-228 (defining a juvenile as any "person less than 18 years of age"), -269.1 (permitting a juvenile offender who is fourteen years of age or older and who commits specific crimes under certain circumstances to be transferred to a Virginia state trial court and tried as an adult), the U.S. Supreme Court has effectively demarcated the ages of majority and minority at eighteen, *see Graham*, 540 U.S. at ___, 130 S. Ct. at 2038 ("*Roper*'s prohibition on the juvenile death penalty followed from our conclusion that '[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders.'") (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). Assuming, *arguendo*, a seventeen-year-old juvenile offender committed a nonhomicide crime in 1995 and was sentenced to life in prison, that person would be ineligible to apply for geriatric release until (approximately) 2038, when he turns sixty and has served at least ten years of his sentence. VA. CODE ANN. § 53.1-40.01. Accordingly, the above data does not and cannot account for nonhomicide juvenile offenders like LeBlanc who were sentenced under the truth-in-sentencing system. Such data, in fact, would not become available until around 2038. This omission is significant for one reason: LeBlanc is effectively asking the Court to find that the Virginia Supreme Court's

decision in *Angel* is contrary to or an unreasonable application of clearly established federal law based on data that does not touch and concern nonhomicide juvenile offenders sentenced to life in prison without parole. This undermines LeBlanc's claim that the geriatric release statute as applied to juveniles is akin to executive clemency.

C. Virginia Parole Board's Considerations

LeBlanc also asserts that applicants for geriatric release, unlike those proceeding under the parole system, must demonstrate a "compelling reason" for why conditional release is appropriate under the circumstances. ECF No. 1 at 5. Coupled with the fact that 95.4% of geriatric release applicants have been denied only because of the seriousness of their offense, ECF No. 19, attach. 1 at 46, according to LeBlanc, the geriatric release statute does not provide nonhomicide juvenile offenders sentenced to life in prison without parole with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *Graham*, 560 U.S. at ___, 130 S. Ct. at 2030. It is the Virginia Parole Board ("Board"), in the first instance, that reviews applications for geriatric release and determines "whether to release inmates [] based on such factors as the nature of the crime, age and medical condition, length of sentence received, time served, criminal record, institutional record, family and community support, and victim input." ECF No. 19, attach. 1 at 143. However, nothing prevents the applicant from asserting as a "compelling reason" for his

conditional release that the offense for which he was convicted and sentenced to life in prison without parole was committed when he was a juvenile. Likewise, contrary to LeBlanc's claim, ECF No. 1 at 6 ("Additionally, the Parole Board's Policy Manual explains that the board . . . cannot consider the offender's young age at the time of the offense."), nothing precludes the Board from granting conditional release on the basis that the applicant was a juvenile at the time he offended. The above factors account for this. For example, the nature of the crime may encompass the age at which the crime was committed and the applicant's institutional record may demonstrate maturity and rehabilitation.

Additionally, "[a]ll factors in the parole consideration process" apply in the determination of geriatric release. ECF No. 18, attach. 9 at 16. In this vein, the Board is guided by, *inter alia*, the applicant's "history," the "facts and circumstances of the offense," and "mitigating and aggravating factors," ECF No. 19, attach. 1 at 158-61, all of which may account for the age of the applicant at the time he offended. The Board also examines the applicant's "conduct, employment, education, vocational training, and other developmental activities during incarceration" as well as his "institutional experience" and "changes in motivation and behavior,"[9] which may account for the applicant's maturity and rehabilitation during incarceration. *Id.*

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[9] "Institutional experience" includes "response to available programs," "academic achievement," "vocational education, training or work assignments," "therapy," and "general adjustment" based on "inter-personal relationships with staff and inmates" as

When taken together, these factors, and their consideration by the Board in weighing applications for geriatric release, appear to comport with the U.S. Supreme Court's directive in *Graham* that states "give defendants like [LeBlanc] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 560 U.S. at ___, 130 S. Ct. at 2030. Time will tell whether that is, in fact, the case. For now, "[i]t is for [Virginia], in the first instance, to explore the means and mechanisms for compliance" with *Graham* by the enactment and implementation of its geriatric release statute.[10] *Angel*, 704 S.E.2d at

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well as "behavior." Likewise, "changes in motivation and behavior" includes "changes in attitude toward self and others," "reasons underlying changes," and "personal goals and description of personal strengths or resources available to maintain motivation for law-abiding behavior." ECF No. 19, attach. 1 at 159-160.

[10] It is of no moment that LeBlanc "will have to serve nearly 44 years before he reaches the age of 60 and becomes eligible to apply for relief under" the geriatric release statute. ECF No. 1 at 7. The U.S. Supreme Court in *Graham* instructed states to "give defendants like [LeBlanc] some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *not* "to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime." *Graham*, 560 U.S. at ___, 130 S. Ct. at 2030. Additionally, the U.S. Supreme Court did not require that an opportunity for release come about ten, twenty, or even thirty years after the defendant is convicted and sentenced. It appears sufficient under *Graham* that the defendant was given "some realistic opportunity to obtain release before the end of that term," presumably before death, even if that opportunity comes forty-four years into his incarceration. *Id.* at ___, 130 S. Ct. at 2034. Virginia's geriatric release statute, according to the Virginia Supreme Court in *Angel*, provides defendants with a meaningful opportunity for release before the end of their prison term, and

401-02 (quoting *Graham*, 560 U.S. at ___, 130 S. Ct. at 2030). And it is sufficient for the purpose of resolving the question presented that the record at this point in time is not well developed, and may not be for some time hereafter, to successfully demonstrate that, contrary to the Virginia Supreme Court's decision in *Angel*, Virginia's geriatric release statute as it applies to nonhomicide juvenile offenders sentenced to life in prison without parole violates the Eighth Amendment as interpreted in *Graham*.[11]

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the undersigned knows of no reason to depart from this determination.

[11] The undersigned has reviewed a recently decided case submitted by LeBlanc, *Parker v. State*, No. 2011-KA-01158-SCT, ___ So.3d ___, 2013 WL 2436630 (Miss. June 6, 2013), in which the Mississippi Supreme Court vacated a defendant's life sentence for a murder he committed as a juvenile. The Court found the defendant's sentence to be incompatible with the U.S. Supreme Court's holding in *Miller v. Alabama*, 130 S. Ct. 2455 (2012), "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile [homicide] offenders," *id.* at 2469 (citing *Graham*, 560 U.S. at ___, 130 S. Ct. at 2030). Specifically, the Mississippi Supreme Court determined that *Miller* applied in this case because though the defendant was sentenced to life, and not life without parole, state law effectively foreclosed the possibility of parole in light of the offense. *Parker*, 2013 WL 2436630, at *7. Although Mississippi has a statute akin to Virginia's in that prisoners may petition for conditional release after turning sixty-five and serving at least fifteen years, *id.* at *8 n.15 (quoting MISS. CODE ANN. § 47-5-139(1)(a)), the Mississippi Supreme Court's analysis in *Parker* does not control here.

First, *Parker* and this case concern two juvenile offenders convicted of two different crimes—a homicide offense in the former and a nonhomicide offense in the latter—and involve two different U.S. Supreme Court decisions applied by the highest courts

V. RECOMMENDATION

For these reasons, the undersigned **RECOMMENDS** the Respondents' Motion to Dismiss, ECF No. 17, be **GRANTED** and LeBlanc's Petition, ECF No. 1, be **DENIED** and **DISMISSED WITH PREJUDICE**.

VI. REVIEW PROCEDURE

By receiving a copy of this Report and Recommendation, the parties are notified that:

1. Any party may serve on the other party and file with the Clerk of the Court specific written objections to the above findings and recommendations within fourteen days from the date this Report and

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of two different states to two different state statutes. Second, *Miller*, which is the focus of the Mississippi Supreme Court's inquiry in *Parker*, does not apply in this case because LeBlanc was not sentenced under a scheme that mandated life in prison without parole for juvenile offenders. Third, the Mississippi Supreme Court, in a conclusory fashion and without evidentiary support, declared that "[c]onditional release is more akin to clemency." *Id.* at *8. Had LeBlanc been sentenced to life in prison without parole because that was the sentence that Virginia law mandated (which Virginia does not), and had the sentencing court, in imposing the harshest possible penalty (apart from the death penalty), failed "to take into account how children are different, and how those differences counsel against irrevocably sentencing [him] to a lifetime in prison" (which LeBlanc does not allege), *Miller*, 132 S. Ct. at 2469, then the parallels between *Parker* and this case would become more apparent. But that is not the situation here, and as such, the undersigned declines to follow and apply the reasoning in *Parker*. The undersigned also takes no position on whether the Mississippi Supreme Court correctly or reasonably interpreted and applied *Miller*.

Recommendation is mailed to the objecting party, *see* 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b), computed pursuant to Federal Rule of Civil Procedure Rule 6(a) plus three days permitted by Federal Rule of Civil Procedure Rule 6(d). A party may respond to another party's specific written objections within fourteen days after being served with a copy thereof. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b).

2. A United States District Judge shall make a *de novo* determination of those portions of this Report and Recommendation or specified findings or recommendations to which objection is made. The parties are further notified that failure to file timely specific written objections to the above findings and recommendations will result in a waiver of the right to appeal from a judgment of this Court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

The Clerk is **DIRECTED** to forward a copy of this Report and Recommendation to counsel of record for the parties.

/s/ Lawrence R. Leonard
Lawrence R. Leonard
United States Magistrate Judge

Norfolk, Virginia
July 24, 2013

CLERK'S MAILING CERTIFICATE

A copy of this Report and Recommendation was mailed on this date to the following:

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/s/ Fernando Galindo
Fernando Galindo
Clerk of the Court

By:

Deputy Clerk
July 24, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DENNIS LeBLANC,

Petitioner,

v.

Civil Action No. 2:12cv340

RANDALL MATHENA,
Chief Warden, Red Onion State Prison, Pound, Virginia, and
COMMONWEALTH OF VIRGINIA,

Respondents.

MEMORANDUM OPINION AND ORDER

Sentencing a child to life imprisonment without the possibility of parole, means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the child, the child will remain in prison for the rest of his or her days.

See Graham v. Florida, 560 U.S. 48, 70 (2010).

OVERVIEW

Before the Court is a Petition from Dennis LeBlanc ("Petitioner" or "Mr. LeBlanc") for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 (ECF No. 1), and a Motion to Dismiss (ECF No. 17) advanced by Respondents Randall Mathena and the Commonwealth of Virginia (collectively, "Respondents"). Mr.

LeBlanc argues that his sentence of two life terms without the possibility of parole for the nonhomicide offenses he committed as a juvenile is contrary to, and an unreasonable application of, federal law as established by the United States Supreme Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010). For the following reasons, this Court agrees. Respondent's Motion to Dismiss (ECF No. 17) is **DENIED**, and Mr. LeBlanc's Petition (ECF No. 1) is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. LeBlanc was convicted by a Virginia state court of rape and abduction with intent to defile. Mr. LeBlanc was sixteen years old when he committed these offenses. Because Mr. LeBlanc committed these offenses in 1999, he is ineligible for parole. VA. CODE ANN. § 53.1-165.1 (2014) ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense.").

On May 11, 2011, following the Supreme Court's ruling in *Graham v. Florida*, 560 U.S. 48 (2010), Mr. LeBlanc moved to vacate his sentences in Virginia state trial court, arguing that because he was sixteen years old at the time of the offense and did not commit a homicide, *Graham* renders his sentence unconstitutional under the Eighth Amendment to the United States Constitution. In *Graham*, the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender

who did not commit homicide." 560 U.S. at 82; *see also Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012) (emphasis added) (recognizing that the *Graham* decision imposed a "*flat ban* on life without parole" for juveniles convicted of nonhomicide offenses).

After conducting an evidentiary hearing on August 9, 2011, the Virginia trial court denied relief to Mr. LeBlanc, concluding that Virginia's Geriatric Release Provision constituted "an appropriate mechanism" that rendered his sentence of two life terms without the possibility of parole an "appropriate sentence" under *Graham*.[1] Aug. 9, 2011 Hr'g Tr. at 25:14-19. In so concluding, the state trial court referenced a Virginia Supreme Court decision—*Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011)—that held that Virginia's Geriatric Release Provision constituted a meaningful opportunity to obtain release for juvenile offenders who did not commit homicide, and that, therefore, sentences of life without parole for these offenders can be construed as compliant with the dictates of *Graham*. 704 S.E.2d at 402 (refusing to vacate a sentence of three life terms plus a term of years for nonhomicide

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[1] Virginia's Geriatric Parole Provision provides:

> Any person serving a sentence imposed upon a conviction for a felony offense, other than a Class 1 felony, (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release.

VA. CODE ANN. § 53.1-40.01 (2014).

offenses that the defendant committed as a juvenile because of Virginia's Geriatric Release Provision). The trial court held that, under *Angel*, the sentence Mr. LeBlanc received was appropriate and not "void ab initio."[2] Aug. 9, 2011 Hr'g Tr. at 25:23-24.

In justifying Mr. LeBlanc's sentence of life without the possibility of parole as "appropriate," the trial court noted that:

> [b]efore [Mr. LeBlanc] came to me, he had been convicted of carjacking, abduction, robbery, use of a firearm in commission of a felony . . . and all those were pending or had been resolved. This case was not only sad but it was tragic for the woman who was raped because, as I said, she was just an elderly lady walking down a path and the defendant raped her and abducted her. . . . [T]he court at the time prior to sentencing had a psychosexual evaluation done, and basically the psychologist said he was a sociopath in so many words. So based on the totality of that, the court gave him a life sentence. . . . I know it's not a pleasant thing to get a life sentence, but the last thing the defendant told me was, Fuck you, quote/unquote twice. . . . [T]hat was what I was dealing with then. . . . [A]nd, as I said, by the time the court got him [for sentencing], he was nineteen years old or twenty.

Aug. 9, 2011 Hr'g Tr. at 23:14-24:18.

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[2] Void ab initio means void "from the beginning." *Void ab initio*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Mr. LeBlanc appealed the decision of the trial court to the Virginia Supreme Court. On April 13, 2012, the Virginia Supreme Court summarily found no reversible error in the trial court's decision.

The Virginia Supreme Court's ruling read in its entirety:

> Upon review of the record of this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

Dennis LeBlanc v. Commonwealth, Record No. 111985, Circuit Court No. CR02-1515 (Va. Apr. 13, 2012).

The Supreme Court of Virginia also denied Mr. LeBlanc's timely petition for rehearing on June 15, 2012. On June 19, 2012, Mr. LeBlanc filed the instant Petition, and the matter was referred for disposition to a United States Magistrate Judge. In a Report and Recommendation (ECF No. 24), the Magistrate Judge recommended granting Respondents' Motion to Dismiss and denying the Petition and dismissing it with prejudice.

In reviewing a Report and Recommendation, this Court "may accept, reject, or modify, in whole or in part, the findings or recommendations" made by the Magistrate Judge. 28 U.S.C. § 636(b)(1) (2009); *accord* Fed. R. Civ. P. 72(b)(3). To the extent a party makes specific and timely written objections to a Magistrate Judge's

findings and recommendations, this Court must review *de novo* "those portions of the report . . . to which objection is made." 28 U.S.C. § 636(b)(1); *accord* Fed. R. Civ. P. 72(b)(3).

The parties were advised of their right to file written objections to the Report and Recommendation. On August 1, 2013, the Court received objections from Mr. LeBlanc. Respondents declined to respond to these objections and filed no objections of their own. The Court ordered supplemental briefing on the matter. All briefing, the recommendations of the Magistrate Judge, and the entire record have been considered carefully.

STANDARDS OF LAW

I. MOTION TO DISMISS

"In proceedings under § 2254, the familiar standards in Rule 12(b)(6) of the Federal Rules of Civil Procedure apply to the government's motion to dismiss." *Walker v. Kelly*, 589 F.3d 127, 138 (4th Cir. 2009); *see also Brooks v. Clarke*, No. 3:15-CV-13, 2015 WL 1737993, at *3 (E.D. Va. Apr. 16, 2015) (employing the Rule 12(b)(6) standard to a motion to dismiss a habeas petition). "Thus, a motion to dismiss a § 2254 petition under Rule 12(b)(6) tests the legal sufficiency of the petition, requiring the federal habeas court to 'assume all

facts pleaded by the § 2254 petitioner to be true.'"[3] *Walker*, 589 F.3d at 139 (citation omitted).

"In assessing whether the § 2254 petition states a claim for relief, the district court must consider "the face of the petition and any attached exhibits." *Id.* (citation omitted). A court may consider material from the record of the state habeas proceeding, including affidavits and evidence presented at trial, "without having to convert the Rule 12(b)(6) motion to one for summary judgment under Rule 56(b)." *Id.* "Moreover, a federal court may consider matters of public record such as documents from prior state court proceedings in conjunction with a Rule 12(b)(6) motion." *Id.*

To survive a motion to dismiss, a complaint must contain sufficient factual information "to state a claim to relief that is plausible on its face." *Brooks*, 2015 WL 1737993, at *4 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). "Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663-64 (2009)). In evaluating a Motion to Dismiss, the Court must

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[3] If the Commonwealth files its Answer to the Petition and its Motion to Dismiss simultaneously, "it technically should have filed the motion under Rule 12(c) as one for judgment on the pleadings." 589 F.3d at 139. The United States Court of Appeals for the Fourth Circuit therefore would construe "the Commonwealth's motion as a motion under Rule 12(c) which is assessed under the same standard that applies to a Rule 12(b)(6) motion." *Id.*

determine whether the petitioner "came forward with sufficient evidence to survive the Commonwealth's dispositive motion [to dismiss] and advance his claim for a merits determination." *Walker*, 589 F.3d at 139.

II. PETITION FOR HABEAS RELIEF

A. Antiterrorism and Effective Death Penalty Act

The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs this Court's consideration of a state prisoner's petition for writ of habeas corpus. *Richardson v. Branker*, 668 F.3d 128, 138 (4th Cir. 2012). The AEDPA standard mandates that a writ of habeas corpus "shall not be granted" for any claim that was adjudicated on the merits in a state court proceeding unless the state court's adjudication was: (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2015). "A state-court decision is contrary to [the Supreme Court's] clearly established precedents if it applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the Supreme Court] but reaches a different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005).

Under the fundamental notions of state sovereignty, the "AEDPA restricts [the] intrusion of state sovereignty by limiting the federal courts' power to issue a writ to exceptional circumstances, thereby helping to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding." *Richardson*, 668 F.3d at 138. This Court is "mindful that 'state courts are the principal forum for asserting constitutional challenges to state convictions,' that habeas corpus proceedings are a 'guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal,' and that a federal court may only issue the writ if 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents.'" *Id.* at 132 (alteration in original) (quoting *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011)).

"In reviewing a state court's ruling on postconviction relief, we are mindful that 'a determination on a factual issue made by a State court shall be presumed correct,' and the burden is on the petitioner to rebut this presumption 'by clear and convincing evidence.'" *Lee v. Clarke*, 781 F.3d 114, 122 (4th Cir. 2015), *as amended* (Apr. 15, 2015) (quoting *Tucker v. Ozmint*, 350 F.3d 433, 439 (4th Cir. 2003)). The AEDPA "demands that state court decisions be given the benefit of the doubt," and it is error for a federal court to conduct *de novo* review of habeas claims that were adjudicated on the merits by a state court. *Richardson*, 668 F.3d at 140-41. However, "[e]ven in the context of federal

habeas, deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." *Brumfield v. Cain*, No. 13-1433, 2015 WL 2473376, at *6 (U.S. June 18, 2015) (alteration in original). The Supreme Court has emphasized that:

> a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.

Richter, 562 U.S. at 102.

Further, the AEDPA "directs a federal habeas court to train its attention on the particular reasons—both legal and factual—why state courts rejected a state prisoner's federal claims." *Hittson v. Chatman*, No. 14-8589, 2015 WL 786705, at *1 (June 15, 2015) (Ginsburg, J., concurring). Importantly, "*Richter* makes clear that where the state court's real reasons can be ascertained, the § 2254(d) analysis can and should be based on the actual 'arguments or theories [that] supported . . . the state court's decision.'" *Id.* at *2 (alteration in original).

A state's highest court may render an unexplained order or summary dismissal, denial, or affirmance of the trial court decision without explanation. When this occurs, the lower court's decision might be the only "reasoned state judgment rejecting [the] federal

claim." *Ylst v. Nunnemake* [sic], 501 U.S. 797, 803 (1991). The reviewing federal court employs a rebuttable presumption that "later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground" as was articulated by the reasoned state judgment. *Id.* (discussing what has become known as the "look through" rule, which directs reviewing federal courts to "look through" to the last reasoned decision in the state courts); *see also Hittson*, 2015 WL 786705, at *2 (noting that *Richter* did not supersede or overrule *Ylst*).

B. *Graham*'s Prohibition on Life without Parole for Juvenile Nonhomicide Offenders

The issue before the Supreme Court of the United States in *Graham* was "whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime." *Graham*, 560 U.S. at 52-53. The Supreme Court in *Graham* concluded that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." *Id.* at 82; *Miller*, 132 S. Ct. at 2465 (emphasis added) (noting that *Graham* imposed a "*flat ban* on life without parole" for juveniles convicted of nonhomicide offenses). The Court in *Graham* noted that if a state "imposes a sentence of *life* it must provide [the child] with some realistic opportunity to obtain release before the end of that term." 560 U.S. at 82 (emphasis added). *Graham* noted that the opportunity must also be "meaningful"

and "based on demonstrated maturity and rehabilitation." *Id.* at 75.

The Petitioner in *Graham*, Terrance Jamar Graham, pled guilty to armed burglary with assault or battery and attempted armed robbery in a Florida state court. *Id.* at 53-54. He was sixteen years old when he committed the offenses. *Id.* at 53. The trial court withheld adjudication of guilt as to both charges and sentenced him to concurrent three year terms of probation. *Id.* at 54. Terrance Graham was required to spend the first twelve months of his probation in the county jail, and with credit for time served, he was released on June 25, 2004. *Id.*

Less than six months later, he was arrested for participating in a home invasion robbery. *Id.* The trial court imposed the maximum possible punishment for the prior offenses—life imprisonment. *Id.* at 57. In so doing, the trial court opined that there was no chance for rehabilitation, stating "We can't do anything to deter you. This is the way you are going to lead your life[.]" *Id.* at 57; 58. Although the sentence did not specify "without parole," the sentence was imposed in Florida, which had abolished parole. *Id.* at 58. Therefore, the imposition of a life sentence gave Terrance Graham no possibility of release unless he was granted executive clemency. *Id.*

The Supreme Court concluded that Terrance Graham's sentence was unconstitutional, holding "that for a juvenile offender who did not commit homicide the Eighth Amendment of the United States Constitution

forbids the sentence of life without parole." *Id.* at 74. The Court declared that "[t]his clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment." *Id.* Therefore, persons below the age of eighteen when the offense was committed "may not be sentenced to life without parole for a nonhomicide crime." *Id.* at 74-75.

Because "[n]othing in Florida's laws prevent[ed] its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character[,]' " Florida's practice was "inconsistent with the Eighth Amendment." *Id.* at 76. The Supreme Court unequivocally recognized that the Eighth Amendment "does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life[,]" but it "*forbids States from making the judgment at the outset* that those offenders never will be fit to reenter society." *Id.* at 75 (emphasis added).

ANALYSIS

I. Motion to Dismiss

The Court first addresses Respondents' Motion to Dismiss, which tests the legal sufficiency of the Petition. *See Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir. 2009). Respondents raised two grounds upon which they seek dismissal: (1) the petition is untimely; and

(2) the petitioner's allegations are without merit and the Petition is frivolous.

First, the Magistrate Judge ruled that the Petition was timely filed. Respondents filed no objection to this ruling. Section 2254 petitions are subject to a one-year statute of limitations that begins to run from the latest of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," or "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(A), (C).

Mr. LeBlanc's judgment became final in 2003. Therefore, his petition filed in 2012 would be untimely, unless *Graham* applies retroactively on collateral review and the limitations period was tolled during the pendency of Mr. LeBlanc's state court motions. The Magistrate Judge concluded that the *Graham* decision applies retroactively on collateral review, and under the limitations period proscribed by 28 U.S.C. § 2244(d)(1)(C), Mr. LeBlanc's Petition was timely filed because the limitations period began to run after *Graham* was decided and was tolled during the pendency of Mr. LeBlanc's motions in the state court.[4]

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[4] "The time during which a properly filed application for [s]tate post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted

As the Magistrate Judge recognized, the United States Court of Appeals for the Fourth Circuit has never held in a published opinion that *Graham* applies retroactively on collateral review. However, it has so held in an unpublished opinion. *See In re Evans*, 449 F. App'x 284 (4th Cir. 2011) (noting that "the Government properly acknowledged that in the appropriate case *Graham* establishes a previously unavailable rule of constitutional law that applies retroactively on collateral review").

Similarly, other federal circuits and this Court have concluded that *Graham* applies retroactively on collateral review. *See, e.g.*, *Goins v. Smith*, 556 F. App'x 434, 437 n.1 (6th Cir. 2014) (unpublished) (noting that "[t]he parties do not dispute that *Graham* applies because it set forth a new rule prohibiting a certain category of punishment for a class of defendants and can therefore be raised on collateral review"); *In re Moss*, 703 F.3d 1301, 1303 (11th Cir. 2013) (holding that *Graham* applies retroactively under one of the *Teague*[5] exceptions); *In re Sparks*, 657 F.3d 258, 260-61 (5th Cir. 2011) (alteration in original) (holding that "*Graham* clearly states a new rule of constitutional law that was not previously available," and that one of the *Teague* exceptions "necessarily dictate[s] the retroactivity of *Graham*'s holding"); *United States v. Evans*, No. 2:92CR163-5, 2015 WL 2169503, at *4 (E.D. Va. May 8, 2015) (concluding that *Graham* "announced a

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toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(2).

[5] Referring to *Teague v. Lane*, 489 U.S. 288 (1989).

new rule of constitutional law retroactively applicable on collateral review"); *cf. Landry v. Baskerville*, No. 3:13CV367, 2014 WL 1305696, at *8 n.11 (E.D. Va. Mar. 31, 2014) (unpublished) (noting that the Supreme Court's language in *Graham* "clearly indicates the announcement of a substantive rule."). This Court concurs with and adopts the Magistrate Judge's determination that *Graham* applies retroactively on collateral review.

Second, Respondents argued, in conclusory fashion, that Mr. LeBlanc's allegations are without merit and that the Petition is frivolous. With respect to the Motion to Dismiss, the Court need only decide whether Mr. LeBlanc "came forward with sufficient evidence to survive the Commonwealth's dispositive motion [to dismiss] and advance his claim for a merits determination." *Walker*, 589 F.3d at 139. A motion to dismiss therefore "tests the legal sufficiency of the petition, requiring the federal habeas court to assume all facts pleaded by the § 2254 petitioner to be true." *Id.*

Neither party disputes that Mr. LeBlanc exhausted all available state remedies, and the Magistrate Judge so held. Because Mr. LeBlanc's claim was adjudicated on the merits in state court, his petition is not procedurally barred from federal review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Mr. LeBlanc is serving a sentence of two life terms without the possibility of parole for nonhomicide offenses he committed as a child. The Supreme Court in *Graham* placed a "categorical bar" or "flat ban" on such sentences. *See Graham*, 560 U.S. at 78-79; *see also Miller*, 132 S. Ct at

2465. The state court concluded that Mr. LeBlanc's sentence was nevertheless appropriate and not invalid from the outset. Therefore, Mr. LeBlanc has alleged sufficient factual information to state a claim to relief that is plausible on its face.

II. Petition for Habeas Relief

Mr. LeBlanc stands before this Court serving two sentences of life without the possibility of parole for offenses he committed at age sixteen. Like Terrance Graham's sentence, Mr. LeBlanc's sentence does not specify "without parole," but, like Florida, Virginia has abolished the parole system. VA. CODE ANN. § 53.1-165.1; *see also Angel v. Commonwealth*, 704 S.E.2d 386, 401 (Va. 2011) (noting that because Virginia has abolished parole, "the effect of" a life sentence "is that [the defendant] will spend the rest of his life confined in the penitentiary").

This Court affords deference to the state court's decision. First, the Court examines the "arguments or theories" that supported the state court's decision, and then the Court "ask[s] whether it is possible that fair-minded jurists could disagree that those arguments or theories are inconsistent with the holding in" *Graham*. *See Richter*, 131 S. Ct. at 786. Because the Supreme Court of Virginia denied Mr. LeBlanc's petition summarily, this Court "looks through" to the last reasoned opinion of the state court and assumes that the higher court based its decision on the same reasoning. *See Ylst*, 501 U.S. at 803; *see also Brumfield v. Cain*, No. 13-1433, 2015 WL 2473376, at *6 (U.S. June 18, 2015)

(employing the "look through" rule). In line with *Richter*, this Court's § 2254(d) analysis is based on "the actual 'arguments or theories [that] supported . . . the state court's decision.'" *See Hittson*, 2015 WL 786705, at *1 (June 15, 2015) (Ginsburg, J., concurring).

In denying relief to Mr. LeBlanc, the trial court stated that Mr. LeBlanc's sentence is "appropriate" because Virginia's Geriatric Release Provision is an "appropriate mechanism" through which Virginia falls into compliance with the dictates of *Graham*. Aug. 9, 2011 Hr'g Tr. at 25:14-19. In justifying Mr. LeBlanc's sentence of life without the possibility of parole as "appropriate," the trial court also noted that "by the time the court got him [for sentencing], he was nineteen years old or twenty." *Id.* at 24:17-18. The trial court further justified the sentence of life imprisonment by pointing to numerous pending and resolved offenses attributed to Mr. LeBlanc, including robbery and carjacking. *Id.* at 23. The trial court went on to say that the psychological reports opined that Mr. LeBlanc was "in so many words" a "sociopath." *Id.* at 23-24. "[B]ased on the totality of that," the state court concluded that a sentence of life imprisonment was appropriate. *Id.* at 24:3.

In 2011, less than a year after the Supreme Court's decision in *Graham*, the Supreme Court of Virginia addressed the issue of whether *Graham* invalidated a defendant's sentence of three consecutive life terms without parole for a nonhomicide offense the defendant committed as a juvenile. *Angel*, 704 S.E.2d at

401.[6] The Supreme Court of Virginia noted the issue relating to the *Graham* decision had not been properly raised in the trial court, but proceeded to address the issue, at the urging of the parties, "to provide guidance to trial courts in Virginia." *Id.* at n.6.

Virginia Code § 53.1-40.01 governs the possible release of geriatric prisoners, and provides for the opportunity of conditional release to prisoners who have reached the age of sixty or older and have served at least ten years of their sentence, or who have reached the age of sixty-five or older and have served at least five years of their sentence. The Supreme Court of Virginia concluded that in light of this provision, Virginia's sentencing scheme can be construed as being in compliance with *Graham*. *See id.* at 401-02. The Virginia Supreme Court held that the possibility of geriatric release provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 401. Therefore, the defendant's sentence of three life terms without the possibility of parole was construed as constitutional.

Similarly, the trial court in Mr. LeBlanc's proceedings concluded that the *Graham* decision did not

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[6] While there were five issues presented in *Angel*, the other four issues related specifically to proceedings at Angel's trial and bear no relevance to the discussion here. *See id.* The petition for writ of certiorari to the Supreme Court of Virginia was summarily denied by the United States Supreme Court. *Angel v. Virginia*, 132 S. Ct. 344 (2011) (denying certiorari). The reason for the denial was not expressed, and it is unclear which of the five issues presented in the *Angel* decision were appealed.

invalidate Mr. LeBlanc's life sentences without the possibility of parole from the outset or otherwise render his sentences inappropriate. As noted above, this Court may grant Mr. LeBlanc's habeas petition if this decision is either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This Court focuses primarily on the first prong of the AEDPA standard because Mr. LeBlanc's arguments concern issues of law, rather than factual determinations. *See Richardson*, 668 F.3d. at 138 n.9.

Affording deference to the trial court determination, including its reliance on *Angel*, and allowing the trial court all benefit of doubt, this Court concludes that the state court determination was both contrary to clearly established Federal law and involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. *Cf. Williams v. Taylor*, 529 U.S. 362, 384-86 (2000) (noting that both the "contrary to" and "unreasonable application of" phrases may be implicated, and the phrases are not "mutually exclusive").

A. Contrary to Clearly Established Federal Law

First, this Court is compelled to conclude that the state court's decision was contrary to clearly established federal law. "A state-court decision is contrary to [the Supreme Court's] clearly established precedents if it applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of [the Supreme Court] but reaches a different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005). The state court's denial of relief to Mr. LeBlanc upholds a sentence of life without parole for a juvenile nonhomicide offender. This contradicts the governing law set forth by the Supreme Court in *Graham*, which imposes a flat ban on such sentences. *See, e.g.*, *Miller*, 132 S. Ct. at 2465.

That *Graham* created a categorical bar or flat ban on imposition of a sentence of life without the possibility of parole on juvenile nonhomicide offenders is not subject to reasonable dispute. This flat ban has been established and recognized by the Supreme Court of the United States. *See, e.g.*, *Miller*, 132 S. Ct. at 2461 (noting that "this Court held in *Graham* [] that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders); *id.* at 2465 (concluding that *Graham* imposed a "flat ban" on life without parole for juvenile nonhomicide offenders); *id.* at 2466 (determining that *Graham* "imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment"); *id.* at 2468

("*Graham* . . . teach[es] that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult"); *id.* at 2470 (noting that "life without parole is permissible for nonhomicide offenses—except, once again, for children"); *id.* at 2475 (Breyer, J., concurring) (noting that "the Eighth Amendment as interpreted in *Graham* forbids sentencing" a juvenile who committed a nonhomicide offense to life imprisonment without parole); *id.* at 2476 (Breyer, J., concurring) ("*Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who kill or intend to kill"); *Graham*, 560 U.S. at 74 ("This Court now holds that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole. This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.").

The flat ban on imposing a sentence of life without the possibility of parole for juvenile nonhomicide offenders has also been recognized by [sic] United States Courts of Appeals, including the Fourth Circuit. *See, e.g.*, *Johnson v. Ponton*, 780 F.3d 219, 222 (4th Cir. 2015) (noting that *Graham* "categorically barred life-without-parole-sentences for juvenile nonhomicide offenders"); *In re Vassell*, 751 F.3d 267, 269-70 (4th Cir. 2014) (emphasis in original) (concluding that a defendant's petition for habeas relief was untimely because his right to relief first became available after *Graham*,

which "prohibited imposing *any* sentence of life without parole—mandatory or individualized—for juveniles convicted of committing nonhomicide offenses"); *id.* at 270 (recognizing that "*Graham* established one rule (a flat ban) for nonhomicide offenders"); *In re Sloan*, 570 F. App'x. 338, 339 (4th Cir. 2014) (noting that *Graham* held "that the Eighth Amendment prohibits a sentence of life without parole for any juvenile offender [] who did not commit homicide"); *accord Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) (concluding that "[t]he Supreme Court was unequivocal that for juvenile nonhomicide offenders, *Graham* established a 'flat ban on life without parole.'").

The Supreme Court noted that "[e]ven if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the *sentence was still disproportionate because that judgment was made at the outset.*" *Graham*, 560 U.S. at 73 (emphasis added). The Eighth Amendment "forbid[s] States from making the judgment at the outset that" a child convicted of nonhomicide offenses "never will be fit to reenter society." *Id.* at 75. However, the state court here twice made the judgment that Mr. LeBlanc would never be fit to reenter society. The state court first made that determination when it sentenced Mr. LeBlanc to life without the possibility of parole in 2003. The state court again made this determination in its decision regarding Mr. LeBlanc's petition for habeas relief. Specifically, after the United State [sic] Supreme Court's holding in *Graham*, the state court justified its sentence of life without parole for a

nonhomicide offense by citing Mr. LeBlanc's prior bad behavior, a study that showed that he was, "in so many words," a sociopath, and the fact that he was already an adult by the time the court "got to him," even though the offenses that triggered his life sentences were committed when he was a juvenile.

The Supreme Court in *Graham* addressed similar comments made by the sentencing court in Terrance Graham's case. *Graham*, 560 U.S. at 57 (reflecting upon the trial court's suggestion that Terrance Graham was beyond all hope of rehabilitation). The Supreme Court of the United States forbade this kind of reasoning in *Graham*. *See id.* at 77 (recognizing that "existing state laws, allowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved, are insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability"); *see id.* at 78-79 (concluding that "[a] categorical rule avoids the risk that . . . a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide" offense).

Moreover, the trial court in Mr. LeBlanc's case relied improperly upon his age at sentencing to justify the harshness of the sentence imposed for crimes he committed as a juvenile. The age of the offender at sentencing has no bearing on the constitutionality of the sentence imposed for offenses the offender committed as a child. *See id.* at 74-75 (emphasis added) (holding

that "those who were below [age eighteen] when the offense was committed *may not be sentenced* to life without parole for a nonhomicide crime").

As in *Graham*, because Mr. LeBlanc was a juvenile nonhomicide offender, his sentence of two life terms without the possibility of parole is unconstitutional. *See Graham*, 560 U.S. at 74-75. In light of the clear dictates of *Graham*, concluding otherwise would be objectively unreasonable. Therefore, the state court's decision is contrary to the Supreme Court's clearly established precedents. *See Brown*, 544 U.S. at 141 (noting that "[a] state-court decision is contrary to [the United States Supreme Court's] clearly established precedents if it applies a rule that contradicts the governing law set forth in [Supreme Court] cases").

Furthermore, as in *Graham*, because "[n]othing in [Virginia]'s laws prevent[s] its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant's crimes demonstrate an 'irretrievably depraved character[,]'" Virginia's practice is "inconsistent with the Eighth Amendment." 560 U.S. at 76.

B. Unreasonable Application of Clearly Established Federal Law

The trial court's decision also was an unreasonable application of clearly established federal law. The "'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal

principle from this Court's decisions but unreasonably applies that principle to the facts of petitioner's case." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). "In other words, a federal court may grant relief when a state court has misapplied a 'governing legal principle' to 'a set of facts different from those of the case in which the principle was announced.'" *Id.* "In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." *Id.* "The state court's application must have been objectively unreasonable." *Id.* at 520-21.

In denying Mr. LeBlanc relief, the trial court concluded that Virginia's Geriatric Release Provision provides juveniles sentenced to life without parole for nonhomicide offenders a meaningful opportunity for release based on demonstrated maturity and rehabilitation. In its analysis, the state court relied partially upon *Angel*.[7] Aug. 9, 2011 Hr'g Tr. at 25. The Supreme Court of Virginia reasoned in *Angel* that:

> [t]he [United States] Supreme Court has left it up to the states to devise methods of allowing juvenile offenders an opportunity for release based on maturity and rehabilitation. While the Supreme Court did not identify a specific method or methods that would provide "meaningful opportunity" for release, the Court clearly stated that states did not have to guarantee that the offender would be

[7] *Angel v. Commonwealth*, 281 Va. 248, 704 S.E.2d 386 (Va. 2011).

> released. Furthermore the Supreme Court did not require the states provide the opportunity for release at any particular time related to either the offender's age or length of incarceration.

704 S.E.2d at 402.

The Virginia Supreme Court concluded that an inmate's opportunity to apply for geriatric release renders a sentence of life without parole for juvenile nonhomicide offenders compliant with *Graham*. *Id.* at 401.

This theory of compliance is a misapplication of the governing legal principle of *Graham*—that children are different and warrant special consideration in sentencing. This misapplication is a basis for granting relief. *See Wiggins*, 539 U.S. at 520 (noting that a federal court may grant relief where the state court misapplied a governing legal principle). It is true that the Supreme Court left it to the states to seek compliance with *Graham*. However, the method proposed by a state cannot directly contravene the foundational principles of *Graham* and still pass constitutional muster. To conclude otherwise would be objectively unreasonable.

The Supreme Court has reiterated that *Graham*'s and *Roper*'s "foundational principle" is that "children are constitutionally different" and warrant special consideration regarding sentencing. *Miller*, 132 S. Ct. at 2458 (noting that *Graham* and *Roper*'s "foundational principle" was "that imposition of a State's most severe

penalties for juvenile offenders cannot proceed as though they were not children"); *id.* at 2464 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."). Of course a state is not required to guarantee eventual freedom to all juvenile nonhomicide offenders. Just as plainly, however, a state cannot continue to impose life without parole sentences on juvenile nonhomicide offenders as if the flat ban on such sentences does not exist. By relying on a geriatric release provision—a provision that by its very name was designed to be invoked by and on behalf of the elderly—in an attempt to salvage unconstitutional sentences, the Supreme Court of Virginia and the state trial court missed the heart of *Graham*—that children are, and must be recognized by sentencing courts as, distinguishable from adult criminals. *See, e.g.*, *Graham*, 560 U.S. 48, 68-69. The Supreme Court of the United States teaches that:

> [a]s compared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed. These salient characteristics mean that it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. Accordingly, juvenile offenders cannot with reliability be classified among the worst offenders. A juvenile is not absolved of responsibility for his

> actions, but his transgression is not as morally reprehensible as that of an adult.

Id. at 68 (internal quotation marks omitted) (citations omitted).

"[T]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive a sentence of life without parole for a nonhomicide crime despite insufficient culpability." *Id.* at 78. Scientific studies and medical developments affirm the differences between children and adults. *See id.* at 68 (noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *see Miller*, 132 S. Ct. at 2464 n.5 (noting that the evidence supporting the scientific differences between children and adults has become "even stronger" after *Graham* and *Roper*). "[F]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Graham*, 560 U.S. at 68.

Although the Supreme Court in *Miller* addressed a different issue, the constitutionality of mandatory life sentences without parole for juveniles, the Supreme Court's recognition of the differences between adults and children is compelling and applicable to this case:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them,

> immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the . . . offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. *See, e.g.*, *Graham*, 560 U.S. at 78 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings"); *J.D.B. v. North Carolina*, 564 U.S. ___, ___, 131 S. Ct. 2394, 2400-01 (2011) (discussing children's responses to interrogation). And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

132 S. Ct. at 2468.

From the inception of the juvenile justice system, reformers recognized that children ought to be treated differently within the criminal justice system. *See, e.g.*, *In re Gault*, 387 U.S. 1, 15 (1967) ("The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison

sentences and mixed in jails with hardened criminals."). Plainly, the Supreme Court has recognized that differences between children and adults must be taken into account when considering sentencing policies. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (recognizing at least three meaningful differences between children and adults); *see also Graham*, 560 U.S. 48, 68-69 (citing *Roper* and recognizing that children warrant special consideration).

Similarly, the Fourth Circuit has recognized that the holdings in *Miller* and *Graham* were rooted in the truth that exceptions are warranted for children facing sentencing. *See, e.g.*, *Johnson v. Ponton*, 780 F.3d 219, 221-22 (4th Cir. 2015) (recognizing that the "concern motivating" the Supreme Court's decision in *Miller* was that the "sentencing scheme" employed by the lower court "preclude[d] consideration of how children are different from adults"); *id.* at 222 (quoting the Supreme Court's rationale that "it is the odd legal rule that does not have some form of exception for children"); *United States v. Howard*, 773 F.3d 519, 532 (4th Cir. 2014) (holding that a district court's sentence failed to appreciate that the defendant was a juvenile when he committed three predicate convictions); *United States v. Hunter*, 735 F.3d 172, 174 (4th Cir. 2013) (noting that "children are constitutionally different from adults for purposes of sentencing due to their diminished culpability and greater prospects for reform") (quoting *Miller*, 132 S. Ct. at 2464)). "Youth is a mitigating factor derive[d] from the fact that the signature qualities of youth are transient; as individuals

mature, the impetuousness and recklessness that may dominate in younger years can subside." *Howard*, 773 F.3d at 532 (alteration in original) (quoting *Roper*, 543 U.S. at 570).

A sentencing scheme that applies the holding of *Graham* in a manner that contravenes *Graham*'s foundational principle, that courts must account for differences between children and adults, evinces an unreasonable application of federal law. *See Wiggins*, 539 U.S. at 520. Virginia attempts to deny the unconstitutionality of this sentencing scheme by relying on its Geriatric Release Provision. This approach does not pass constitutional muster.

If it can be said that Virginia's sentencing scheme treats children differently than adults, it would be because, tragically, the scheme treats children *worse*. Under Virginia's current sentencing policies, prisoners are serving sentences of life without the possibility of parole for nonhomicide offenses that they committed as children. Like any other prisoner in Virginia, regardless of their age at the time of the offense, if these prisoners live to see the age of sixty or sixty-five, they may apply for geriatric release. This treats children worse than adults. *See Graham*, 560 U.S. at 70 (recognizing that life without parole for juveniles imposes a harsher sentence on children than adults who receive the same sentence because the child will spend a "greater percentage of his life in prison than an adult offender"). For example, a "16-year old and a 75-year-old each sentenced to life without parole receive the

same punishment in name only." *Id.* "This reality cannot be ignored." *Id.*

In reality, children are receiving harsher sentences than adults: they are subjected to life terms of imprisonment without the possibility of parole like adults, and they must serve a larger percentage of their sentence than adults do before eligibility to apply for geriatric release occurs. *C.f. Kent v. United States*, 383 U.S. 541, 556 (1966) (in addressing rights afforded to juveniles in the early years of the juvenile justice system, noting that "there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children").

This Court is guided by the principles recognized in *Graham* that, as addressed above, "all juvenile nonhomicide offenders [should be given] a chance to demonstrate maturity and reform." *Graham*, 560 U.S. at 79. While a state "need not guarantee the [nonhomicide juvenile] offender's eventual release . . . it *must* provide him or her with *some realistic opportunity to obtain release.*" *Id.* at 82 (emphases added).

Mr. LeBlanc and all similarly situated juveniles lack any chance of seeking a meaningful life, while older, more culpable prisoners may be given an opportunity to obtain freedom in ten years or less. This "application" of *Graham* would not be simply incorrect or erroneous; it is objectively unreasonable because it turns *Graham* on it's head. *See Barnes v. Joyner*, 751

F.3d 229, 251 (4th Cir. 2014) (concluding that a trial court's decision was not simply incorrect or erroneous, but was objectively unreasonable where the trial court's actions "turned [the applicable Supreme Court precedent] on its head").

Geriatric release cannot be the type of "meaningful opportunity" for release envisioned by the Supreme Court in *Graham*. *See Casiano v. Comm'r of Correction*, No. 19345, 2015 WL 3388481, at *11 (Conn. May 26, 2015) ("[W]e do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*.") (quoting *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)); *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (noting that the prospect of geriatric release does not comport with the dictates of *Graham*); *Null*, 836 N.W.2d at 71 ("The prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*").[8]

As the Supreme Court of Connecticut recognized, "[a] juvenile offender is typically put behind bars before he has had a chance to exercise the rights and responsibilities of adulthood, such as establishing a career, marrying, raising a family or voting." *Casiano*,

[8] This Court is unaware of any jurisdiction in the country other than Virginia that has held that an opportunity for geriatric release for juvenile nonhomicide offenders serving life terms without parole comports with the dictates of *Graham*.

No. 19345, 2015 WL 3388481, at *10. Even assuming that a juvenile offender does "live to be released, after a half century of incarceration, he will have irreparably lost the opportunity to engage meaningfully in many of these activities," and the offender "will be left with seriously diminished prospects for his quality of life for the few years he has left." *Id.* Further, a juvenile released in his or her sixties is released at a time "when the law presumes that he [or she] no longer has productive employment prospects." *Id.* "[T]he offender [may] be age-qualified for Social Security benefits without ever having had the opportunity to participate in gainful employment." *Id.* (citing 42 U.S.C. § 416(1)). The juvenile's prospects for a meaningful life "will also be diminished by the increased risk for certain diseases and disorders that arise with more advanced age[.]" *Id.* This Court agrees with the Supreme Court of Connecticut's reasoning that:

> the United States Supreme Court viewed the concept of "life" in *Miller* and *Graham* more broadly than biological survival; it implicitly endorsed the notion that an individual is effectively incarcerated for "life" if he will have no opportunity to truly reenter society or have any meaningful life outside of prison.

Id. at *11 (holding that *Graham* and *Miller* apply to lengthy term-of-year sentences and that a term of fifty years imprisonment without parole for a juvenile offender implicate the procedures set forth in *Miller*).

The Supreme Court of Wyoming also noted that the determination of whether the principles of *Miller*

and *Graham* apply in a given case should not turn on the "niceties of epidemiology, genetic analysis, or actuarial sciences in determining precise mortality dates." *Bear Cloud v. State*, 334 P.3d 132, 142 (Wyo. 2014) (quoting *Null*, 836 N.W.2d at 71).[9] This Court finds the reasoning of the Supreme Courts of Iowa, Wyoming, and Connecticut persuasive. The remote possibility of geriatric release does not provide a meaningful opportunity for release based on demonstrated maturity and rehabilitation.

As a matter of law, parole and geriatric release in Virginia are different concepts, notwithstanding some similarities. *See Solem v. Helm*, 463 U.S. 277, 300 (1983) (noting that "parole and commutation are different concepts, despite some surface similarities"). Surface similarities include that the Virginia Parole Board regulates both parole and geriatric release, and that the release factors applicable to parole are also applied in the geriatric release process. VA. CODE. ANN. § 53.1-40.01; Va. Parole Bd. Admin. P. No. 1.226 ("Conditional Release of Geriatric Inmates"). However, most similarities end there.

Provisions governing parole are found in a chapter entitled "Probation and Parole" in Virginia's statutory provisions. VA. CODE. ANN. § 53.1-151. The geriatric release provision is contained in the chapter regarding "State Correctional Facilities," and in a subsection

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[9] The court in *Bear Cloud* also noted that the United States Sentencing Commission equates a sentence of 470 months (39.17 years) to a life sentence. 334 P.3d at 142.

regarding the "privileges" of prisoners. *See* VA. CODE. ANN. § 53.1-40.01. Inmates who have been identified for a first parole consideration "*shall* be interviewed for parole." Va. Parole Bd. Admin. P. No. 1.201 (emphasis added). The Virginia Parole Board has discretion to deny any petition for geriatric release "on a review of the record," without advancing to the interview stage. *Id.* at No. 1.226. Additionally, unlike inmates applying for regular parole, inmates applying for geriatric release must identify "compelling reasons" for conditional release. *Id.*

Further, prisoners applying for geriatric release who are serving life sentences require the concurrence of four members of the Parole Board for a grant of conditional release. Va. Parole Bd. Admin. P. No. 1.226 (requiring a concurrence of four members for geriatric release to prisoners serving a life term). Prisoners applying for regular parole consideration require only three such votes. Va. Parole Bd. Policy Manual, sec. II, subsec. G, para. 1 (requiring concurrence of three members). The opportunity for release under Virginia's Geriatric Release Provision is similar to the regular parole decision process for inmates serving life sentences for first degree murder. Both require concurrence of four members. *Compare* Va. Parole Bd. Admin. P. No. 1.226 (requiring a concurrence of four members for any geriatric release prisoner currently serving a life term) *with* Va. Parole Bd. Admin. P. No. 1.206 (requiring a concurrence of four members for inmates serving sentences for first-degree murder).

The Magistrate Judge's Report and Recommendation focused on statistics and probabilities which illustrate that typically, only a small percentage of geriatric release eligible inmates are released through the provision. Although statistics may shed light on whether the opportunity for release is realistic, this Court concludes that statistics cannot be given a controlling effect on whether a state is in compliance with *Graham*. Statistics change, and what may be reasonably viewed as "realistic" one year may not be so the next.

The Supreme Court in *Graham* imposed a categorical bar on a sentence of life without the possibility of parole to prevent the "possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders[.]" *Graham*, 560 U.S. at 74. The *Graham* Court did not address the statistics related to how often prisoners were granted executive clemency in Florida. Instead, the Supreme Court rejected the possibility of executive clemency as a basis to save an otherwise unconstitutional sentence because clemency is an "ad hoc exercise" that may occur for any reason, and because parole is a "regular part of the rehabilitative process." *See Graham*, 560 U.S. at 69-70 (citing *Solem*, 463 U.S. at 300). Although statistics are helpful, a method that focuses too heavily on release statistics misses the mark of *Graham* and *Solem*, which emphasized the nature of the opportunity for release, not merely the regularity of its use.

The Magistrate Judge's Report and Recommendation also noted that discerning whether juvenile nonhomicide offenders in Virginia serving life terms will

be released under Virginia's Geriatric Release Provision at realistic or meaningful levels is impossible because no juvenile under that sentencing scheme has yet reached age sixty. Compelling juveniles who are currently serving sentences of life without the possibility of parole to wait until enough similarly situated juveniles reach age sixty so that courts can reassess the probabilities and statistics related to geriatric release perpetuates the injustice that *Graham* sought to correct. By proceeding to apply the foundational principles of *Graham* in evaluating the sentences that juveniles are currently serving, this Court need not engage in speculation about what these juveniles might face in forty or fifty years. Mr. LeBlanc is entitled to challenge the constitutionality of his sentence now. *Cf. Rowe v. Peyton*, 383 F.2d 709, 719 (4th Cir. 1967) *aff'd*, 391 U.S. 54 (1968) (concluding that "the remedy to serve the pressing need for an undelayed judicial determination of these substantial claims of constitutional deprivations should be the traditional one in this area, habeas corpus"). "Justice delayed for want of a procedural, remedial device over a period of many years is, indeed, justice denied to the prisoner and, in an even larger degree, to Virginia." *Id.* at 715.

Under Virginia's current sentencing scheme, *Graham* has been rendered a judicial nullity. Before *Graham*, nothing prevented Virginia state courts from imposing the sentence of life without parole for juvenile nonhomicide offenders, and all prisoners had the same opportunity to apply for geriatric release at age sixty. After *Graham*, under the state's rationale,

nothing prevents Virginia state courts from imposing the sentence of life without parole for juvenile nonhomicide offenders, and all prisoners have the same opportunity to apply for geriatric release. Virginia's sentencing scheme for juveniles violates the spirit and the letter of *Graham*, and the state trial court's application of *Graham* in denying Mr. LeBlanc relief is objectively unreasonable. *See Barnes v. Joyner*, 751 F.3d 229, 251 (4th Cir. 2014).

Other states have understood that *Graham*'s flat ban on sentences of life without parole for juveniles convicted of nonhomicide offenses compel changes that afford constitutional protection (in various forms) to prisoners. *See, e.g.*, *Lawton v. State*, No. SC13-685, 2015 WL 1565725, at *1 (Fla. April 9, 2015) (noting that the categorical ban in *Graham* applies "*in all circumstances*"); *Henry v. State*, No. SC12-578, 2015 WL 1239696, at *2 (Fla. Mar. 19, 2015) ("the status of juvenile offenders warrants different considerations by the states whenever such offenders face criminal punishment as if they are adult"); *State v. Shaffer*, 77 So.3d 939, 942 (La. 2011) (removing the restriction on parole eligibility for a juvenile after noting that "*Graham* reflects the Supreme Court's determination that juveniles are a special class of offenders deserving of special protections otherwise not accorded adult offenders"); *see also State v. Castaneda*, 842 N.W.2d 740, 759 (Neb. 2014) (noting that Nebraska enacted new legislation *post-Graham* in order to afford juveniles the protections that the federal constitution requires).

In light of the foregoing analysis, "[e]ven the most skilled legal contortionist could not interpret [the trial court's decision] in a way that sensibly comports with the Supreme Court's crystalline pronouncements" in *Graham*. *See United States v. Hashime*, 722 F.3d 572, 574 (4th Cir. 2013). There is no possibility that fair-minded jurists could disagree that the state court's decision conflicts with" the dictates of *Graham*. Therefore, this Court must grant Mr. LeBlanc's petition. *See Richter*, 131 S. Ct. at 786-87.

Life without parole deprives a child of hope of restoration. *Graham*, 560 U.S. at 69-70. "[T]his sentence means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the child], he [or she] will remain in prison for the rest of his [or her] days." *Id.* at 70.

As the Virginia Supreme Court itself recognized, a sentence of life in Virginia means that children "will spend the rest of [their] li[ves] confined in the penitentiary." *Angel*, 704 S.E.2d at 401. Virginia's sentencing scheme for juveniles who commit nonhomicide crimes treats children worse than adults, and strips them of hope. Hope allows a child to live for an assured future despite an imperfect past.

The Supreme Court has recognized that nonhomicide juvenile offenders serving life sentences must be given "the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Graham*, 560 U.S. at 79. The distant and minute

chance at geriatric release at a time when the offender has no realistic opportunity to truly reenter society or have any meaningful life outside of prison deprives the offender of hope. Without hope, these juvenile offenders are being discarded in cages and left to abject despair rather than with any meaningful reason to develop their human worth. This result falls far short of the hallmarks of compassion, mercy and fairness rooted in this nation's commitment to justice.

CONCLUSION

Petitioner's objections to the Magistrate Judge's Report and Recommendation (ECF No. 24) are **SUSTAINED**. Accordingly Respondents' Motion to Dismiss (ECF No. 17) is **DENIED**. Because the state court's decision was both contrary to, and an unreasonable application of, clearly established federal law set forth in *Graham v. United States*, 560 U.S. 48 (2010), Mr. LeBlanc's Petition (ECF No. 1) is **GRANTED**. His case is **REMANDED** for resentencing in accordance with *Graham*. Mr. LeBlanc may not be sentenced to life without the possibility of parole for nonhomicide offenses he committed as a juvenile.[10]

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[10] Although the issue is not presently before this Court, other jurisdictions have held that *Miller* and *Graham* apply to lengthy term-of-years sentences or aggregate sentences, and this Court agrees. *See Moore v. Biter*, 725 F.3d 1184, 1192 (9th Cir. 2013) (holding that a sentence of 254 years is materially indistinguishable from a life sentence without the possibility of parole); *Casiano v. Comm'r of Correction*, No. 19345, 2015 WL 3388481. at *11 (Conn. May 26, 2015) (concluding that "a fifty year term and

IT IS SO ORDERED.

/s/ Arenda L. Wright Allen
Arenda L. Wright Allen
United States District Judge

July 1 , 2015
Norfolk, Virginia

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its grim prospects for any future outside of prison effectively provide a juvenile offender with 'no chance for fulfillment outside prison walls, . . . no hope.' "); *Brown v. State*, 10 N.E.3d 1, 7-8 (Ind. 2014) (reducing a juvenile's sentence to eighty years after concluding that, while the trial court acted within its discretion when it imposed a sentence of 150 years for murder, such a sentence "means denial of hope"); *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (holding that an aggregate sentence of just over forty-five years was the de facto equivalent of a life sentence without parole); *State v. Null*, 836 N.W.2d 41, 72 (Iowa 2013) (holding that "*Miller*'s principles are fully applicable to a lengthy term-of-years sentence"); *People v. Caballero*, 282 P.3d 291, 296 (Cal. 2012) (holding that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment"). However, some courts have concluded that *Miller* and *Graham* are inapplicable to term-of-years sentences. *See Bunch v. Smith*, 685 F.3d 546, 552-53 (6th Cir. 2012) (concluding that even though an aggregate sentence of eighty-nine years may be the functional equivalent of life, *Graham* applied only to sentences of "life," not aggregate sentences that result in a lengthy term of years); *State v. Brown*, 118 So.3d 332, 342 (La. 2013) (concluding that "nothing in *Graham* addresses a defendant convicted of multiple offenses and given term of year sentences").

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

DENNIS LeBLANC,
Petitioner,

v. **Civil Action No. 2:12cv340**

RANDALL MATHENA,
Chief Warden,
Red Onion State Prison, Pound, Virginia,
and COMMONWEALTH OF VIRGINIA,

Respondents.

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came on for decision before the Court. The issues have been decided and a decision has been rendered.

IT IS ORDERED, ADJUDGED and DECREED Petitioner's objections to the Magistrate Judge's Report and Recommendation (ECF No. 24) are **SUSTAINED**. Accordingly Respondents' Motion to Dismiss (ECF No. 17) is **DENIED**. Because the state court's decision was both contrary to, and an unreasonable application of, clearly established federal law set forth in Graham v. United States, 560 U.S. 48 (2010), Mr. LeBlanc's Petition (ECF No. 1) is **GRANTED**. His case is **REMANDED** for resentencing in accordance with Graham. Mr. LeBlanc may not be sentenced to life

without the possibility of parole for nonhomicide offenses he committed as a juvenile. IT IS SO ORDERED.

July 1, 2015
Date

FERNANDO GALINDO, CLERK

By: /s/
Lara Dabbene, Deputy Clerk

FILED: January 20, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-7151
(2:12-cv-00340-AWA-LRL)

DENNIS LEBLANC

Petitioner – Appellee

v.

RANDALL MATHENA, Chief Warden,
Red Onion State Prison, Pound, Virginia;
COMMONWEALTH OF VIRGINIA

Respondents – Appellants

ORDER

Appellants' petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: February 1, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-7151
(2:12-cv-00340-AWA-LRL)

DENNIS LEBLANC

Petitioner – Appellee

v.

RANDALL MATHENA, Chief Warden,
Red Onion State Prison, Pound, Virginia;
COMMONWEALTH OF VIRGINIA

Respondents – Appellants

ORDER

Upon consideration of the consent motion to stay mandate pending the filing of a petition for a writ of certiorari, the court grants the motion.

The stay shall not exceed 90 days absent notice that the petition has been filed or a showing of good cause for extension. If the petition is filed, the stay continues until the Supreme Court's final disposition. Fed. R. App. P. 41(d)(2)(B).

Upon filing a petition for writ of certiorari in the Supreme Court, counsel shall notify this court in writing. Counsel shall also notify this court in writing when the petition is denied or, if granted, when judgment has been entered by the Supreme Court.

Entered at the direction of the panel: Judge Niemeyer, Judge Wynn, and Judge Johnston. Judge Niemeyer and Judge Johnston voted to grant the motion to stay issuance of the mandate. Judge Wynn voted to deny the motion.

For the Court

/s/ Patricia S. Connor, Clerk

Commonwealth of Virginia

VIRGINIA PAROLE BOARD

ADMINISTRATIVE

PROCEDURES MANUAL

[SEAL]

COMMONWEALTH OF VIRGINIA [SEAL] VIRGINIA PAROLE BOARD ADMINISTRATIVE PROCEDURE	Section: **Parole Process**	Number **1.226**
	Subject **Conditional Release of Geriatric Inmates**	
	Effective Date: **November 14, 1995**	
	Revision Date: **July 15, 2001**	

POLICY:

The Virginia Parole Board shall review all petitions for Conditional Release submitted in accordance with the requirements and provisions of §53.1-40.01 The Virginia Parole Board may deny the petition on a review of the record. Petitions not denied on review of the record shall be considered through the procedures enumerated below. This policy shall not apply to those individuals sentenced for a Class 1 felony.

PROCEDURE:

Application

The inmate may submit a petition not earlier than 90 days prior to the earliest potential conditional release date. Petitions submitted earlier will be returned as not qualified for consideration of conditional release.

Inmates may receive only one consideration for release, either discretionary parole or conditional release, in any 12 month period. However, this does not preclude the Board from considering an inmate for discretionary parole under its statutory authority §53.1-154.

Initial Review

The inmate must petition the Virginia Parole Board on forms provided by the Board to verify inmate's age and portion of sentence served to comply with the statutory requirements. The inmate must also identify compelling reasons for conditional release. The members of the Virginia Parole Board will review such petitions, the Virginia Department of Correction's central file and any other pertinent information. The petition may be denied upon such review by majority vote of the Board. If the petition is not denied, it will automatically be advanced to the next level of review.

Inmates qualifying for such petitions under the terms of §53.1-40.01 who are denied conditional release may resubmit petitions annually unless deferred by the Virginia Parole Board for a period of 2 or 3 years as specified by the Virginia Parole Board.

Assessment Review

A member of the Virginia Parole Board or designated staff shall conduct a personal assessment interview with the petitioner. The interviewing Board member or designated staff shall compose a written assessment of the inmate's suitability for conditional release and recommend to grant or not grant a conditional release with supporting reasons. If a Board member conducts the review, the member shall record a vote to grant or not grant a conditional release. All factors in the parole consideration process including Board appointments and Victim Input shall apply in the determination of Conditional Release. The case shall then be directed successively to the other members of the Board for review and decision. The decision shall require the concurrence of no less than three (3) members of the Board. In the case of life sentences, a decision to grant conditional release shall require the concurrence of four (4) members of the Board.

Victim Services consisting of receipt and recording of comments and notification as required by §53.1-155 of the Code of Virginia and Virginia Parole Board Administrative Procedure No. 1.225 will be provided.

If an inmate petitions for a conditional release and is determined to be qualified for consideration, any crime victim who has requested to be notified will receive a written notification that an inmate has petitioned for conditional release. The crime victim(s) will be afforded 60 days to provide comments and concerns to the Virginia Parole Board. A crime victim may submit information in written form, a Board Appointment, or telephonic Board appointment. Consideration of any conditional release will be suspended until

a crime victim has had the 60-day period to provide comments.

Once a final decision has been made on a conditional release the crime victim will be notified of the action taken.

Conditions of Release

The terms and conditions of release shall be at the discretion of the Board. Such terms may be similar or identical to the general Conditions of Parole with community supervision provided by the Virginia Department of Corrections' Division of Probation and Parole Services. The Board may additionally impose such special conditions as deemed appropriate and the Board shall establish the period of supervision.

For cause shown of the violation of one or more terms of the Conditional Release, the Virginia Parole Board may order the arrest and reincarceration of the Conditional Releasee. Whereas conditional releasees are under the direct supervision of probation and parole officers, such releasees shall be subject to arrest for violation of any terms of such release as provided by §53.1-145, §53.1-158, §53.1-161, §53.1-162, §53.1-163, §53.1-164 and §53.165 of the Code of Virginia. Such action shall be executed through the Major Violation Procedure for parolees and pardoners and related policies set forth in the *Virginia Parole Board Policy Manual* of July, 1997.

Review Following Revocation of Conditional Release
Conditional Releasees whose release is revoked may be considered upon petition at the discretion of the Board.

VIRGINIA PAROLE BOARD

[SEAL]

POLICY MANUAL

OCTOBER 1, 2006

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INTRODUCTION

THE VIRGINIA PAROLE BOARD IS COMPOSED OF THREE FULL-TIME AND TWO PART-TIME MEMBERS, APPOINTED BY THE GOVERNOR TO SERVE STAGGERED FOUR-YEAR TERMS AT THE PLEASURE OF THE GOVERNOR AND SUBJECT TO CONFIRMATION BY THE VIRGINIA GENERAL ASSEMBLY. ONE MEMBER IS DESIGNATED BY THE GOVERNOR TO SERVE AS CHAIRMAN OF THE BOARD. THE BOARD MAY ELECT ONE OF ITS MEMBERS AS VICE-CHAIRMAN WHO SHALL ACT IN THE ABSENCE OF THE CHAIRMAN.

IN THE EXERCISE OF THEIR QUASI-JUDICIAL FUNCTIONS OF ADULT PAROLE SELECTION, DISCHARGE OR REVOCATION, THE VIRGINIA PAROLE BOARD HAS EXCLUSIVE JURISDICTION.

PAROLE IS A PROCESS THROUGH WHICH OFFENDERS ARE PROVISIONALLY RELEASED

FROM CORRECTIONAL INSTITUTIONS PRIOR TO THE COMPLETION OF THEIR SENTENCES, SUBJECT TO CONDITIONS ESTABLISHED BY THE PAROLE BOARD. THE DIRECT SUPERVISION OF PERSONS ON PAROLE IS THE RESPONSIBILITY OF THE DEPARTMENT OF CORRECTIONS.

THE GOAL OF THE PAROLE BOARD IS TO RELEASE ON PAROLE, THOSE ELIGIBLE OFFENDERS DEEMED SUITABLE FOR RELEASE AND WHOSE RELEASE WILL BE COMPATIBLE WITH THE WELFARE OF SOCIETY AND THE OFFENDER. THE PAROLE BOARD, IN CONJUNCTION WITH THE DEPARTMENT OF CORRECTIONS, STRIVES TO RESTORE WITHIN THE OFFENDER A SENSE OF SELF-ESTEEM AND PERSONAL RESPONSIBILITY AND, AT THE SAME TIME, TO SECURE ADEQUATE SAFEGUARDS ON BEHALF OF THE COMMUNITY.

THE FOLLOWING SHALL CONSTITUTE THE RULES AND POLICIES OF THE VIRGINIA PAROLE BOARD WHICH ARE PUBLISHED UNDER THE AUTHORITY OF SECTION 53.1-136.1, *CODE OF VIRGINIA*. WHERE THE LAW DICTATES BOARD POLICY, THE PERTINENT SECTION OF THE *CODE OF VIRGINIA* IS CITED IN PARENTHESES

I. PAROLE DECISION FACTORS

THE VIRGINIA PAROLE BOARD, IN DETERMINING WHETHER AN INDIVIDUAL

SHOULD BE RELEASED ON PAROLE, IS GUIDED BY THE FOLLOWING FACTORS:

A. COMPATIBILITY OF RELEASE (53.1-155)

WHETHER THE INDIVIDUAL'S RELEASE AT THE TIME OF CONSIDERATION WOULD BE COMPATIBLE WITH PUBLIC SAFETY AND THE MUTUAL INTERESTS OF SOCIETY AND THE INDIVIDUAL.

B. BASIS FOR RELEASE

WHETHER THE INDIVIDUAL'S HISTORY, PHYSICAL AND MENTAL CONDITION AND CHARACTER, AND THE INDIVIDUAL'S CONDUCT, EMPLOYMENT, EDUCATION, VOCATIONAL TRAINING, AND OTHER DEVELOPMENTAL ACTIVITIES DURING INCARCERATION, REFLECT THE PROBABILITY THAT THE INDIVIDUAL WILL LEAD A LAW-ABIDING LIFE IN THE COMMUNITY AND LIVE UP TO ALL CONDITIONS OF PAROLE IF RELEASED.

C. EFFECT ON INSTITUTIONAL DISCIPLINE

WHETHER THE INDIVIDUAL'S RELEASE WOULD HAVE SUBSTANTIAL

ADVERSE EFFECT ON INSTITUTIONAL DISCIPLINE.

D. SENTENCE DATA

1. TYPE OF SENTENCE

   A. SINGLE (INVOLVING ONE OFFENSE)

   B. MULTIPLE (INVOLVING MORE THAN ONE OFFENSE AND/OR SENTENCE)

   C. SPLIT (INVOLVING A SENTENCE TO PRISON PLUS A SUSPENDED TERM AGAINST WHICH THE OFFENDER CAN BE HELD ACCOUNTABLE BY THE COURT THROUGH PROBATION OR OTHERWISE AFTER RELEASED FROM PRISON)

2. LENGTH OF SENTENCE

3. RECOMMENDATIONS OF COURT, COMMONWEALTH'S ATTORNEY, AND OTHER RESPONSIBLE OFFICIALS

E. PRESENT OFFENSE

1. FACTS AND CIRCUMSTANCES OF THE OFFENSE

2. MITIGATING AND AGGRAVATING FACTORS

3. ACTIVITIES FOLLOWING ARREST AND PRIOR TO CONFINEMENT, INCLUDING ADJUSTMENT ON BOND OR PROBATION, IF ANY

F. PRIOR CRIMINAL RECORD

1. EXTENT, NATURE AND PATTERN OF OFFENSES
2. ADJUSTMENT TO PREVIOUS PROBATION, PAROLE AND CONFINEMENT

G. PERSONAL AND SOCIAL HISTORY

1. FAMILY AND MARITAL HISTORY
2. INTELLIGENCE AND EDUCATION
3. EMPLOYMENT AND MILITARY EXPERIENCE
4. PHYSICAL AND MENTAL HEALTH

H. INSTITUTIONAL EXPERIENCE

1. RESPONSE TO AVAILABLE PROGRAMS
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1. CHANGES IN ATTITUDE TOWARD SELF AND OTHERS
2. REASONS UNDERLYING CHANGES
3. PERSONAL GOALS AND DESCRIPTION OF PERSONAL STRENGTHS OR RESOURCES AVAILABLE TO MAINTAIN MOTIVATION FOR LAW-ABIDING BEHAVIOR

J. RELEASE PLANS

1. RESIDENCE
   A. ALONE
   B. WITH FAMILY
   C. WITH OTHERS
2. EMPLOYMENT, TRAINING, OR ACADEMIC EDUCATION
3. DETAINERS

K. COMMUNITY RESOURCES

1. SPECIAL NEEDS

   A. SUBSTANCE ABUSE TREATMENT AND COUNSELING

   B. REHABILITATIVE SERVICES

   C. INTENSIVE PAROLE SUPERVISION

2. VOLUNTEER SERVICES

L. RESULTS OF SCIENTIFIC DATA

1. PSYCHOLOGICAL TESTS AND EVALUATIONS

~~2. RISK ASSESSMENT DATA~~

Revised 10/1/2006

M. IMPRESSIONS GAINED WHEN AN INTERVIEW IS CONDUCTED

N. INFORMATION FROM LAWYERS, FAMILY MEMBERS, VICTIMS AND OTHER PERSONS

~~AS OF JANUARY 1, 1992, THE VIRGINIA PAROLE BOARD HAS STRUCTURED MANY OF THE ABOVE CITED FACTORS IN A DECISION GUIDELINES MODEL CONSISTING OF 4 COMPONENTS: RISK, TIME SERVED, MAJOR INFRACTIONS AND AUXILIARY INFORMATION. THIS GUIDELINES MODEL IS A STRUCTURED INFORMATION SYSTEM TO~~

~~ASSIST THE VIRGINIA PAROLE BOARD. IT IS NOT BINDING ON THE VIRGINIA PAROLE BOARD. THE VIRGINIA PAROLE BOARD DECISION IS FINAL.~~

Revised 10/1/2006

II. PAROLE CONSIDERATION POLICIES AND PRACTICES

A. PAROLE ELIGIBILITY

1. PERSONS SERVING VIRGINIA FELONY SENTENCES FOR WHICH THEY ARE PAROLE ELIGIBLE, BECOME ELIGIBLE:

   A. FOR THE FIRST TIME, AFTER SERVING ONE-FOURTH OF THEIR TERM OF IMPRISONMENT, OR AFTER 12 YEARS, WHICHEVER IS SHORTER;

   B. FOR THE SECOND TIME, AFTER SERVING ONE-THIRD OF THEIR TERM OF IMPRISONMENT, OR AFTER 13 YEARS, WHICHEVER IS SHORTER;

   C. FOR THE THIRD TIME, AFTER SERVING ONE-HALF OF THEIR TERM OF IMPRISONMENT, OR 14 YEARS, WHICHEVER IS SHORTER; AND

   D. FOR THE FOURTH OR SUBSEQUENT TIME, AFTER SERVING THREE-FOURTHS OF THEIR TERM

OF IMPRISONMENT, OR AFTER 15 YEARS, WHICHEVER IS SHORTER. (53.1-151; 19.2-308.1)

2. PERSONS SERVING THEIR SECOND OR SUBSEQUENT INCARCERATION FOR FELONIES MAY BE DESIGNATED FOR EARLIER PAROLE CONSIDERATION THAN THE TIME SPECIFIED IN "B" THROUGH "D" OF THE PRECEDING SECTION IF THEY ARE REFERRED BY THE DIRECTOR TO THE BOARD FOR SUCH EARLIER CONSIDERATION. (53.1-154.1)

3. PERSONS SENTENCED TO LIFE IMPRISONMENT FOR THE FIRST TIME SHALL BE ELIGIBLE FOR PAROLE AFTER SERVING 15 YEARS. (53.1-151)

4. PERSONS SENTENCED TO TWO OR MORE LIFE SENTENCES BECOME ELIGIBLE FOR PAROLE AFTER SERVING 20 YEARS. (53.1-151)

5. PERSONS SERVING BOTH FELONY AND MISDEMEANOR SENTENCES SHALL BE ELIGIBLE FOR PAROLE ON THE COMBINATION OF SAID SENTENCES IN THE SAME MANNER AS PERSONS SERVING FELONY SENTENCES. (53.1-152)

6. PERSONS SERVING MISDEMEANOR SENTENCES IN EXCESS OF 12 MONTHS, EXCLUSIVE OF FINES,

SHALL BE ELIGIBLE FOR PAROLE IN THE SAME MANNER AS PERSONS SERVING FELONY SENTENCES. (53.1-153)

7. YOUTHFUL OFFENDERS AS DEFINED IN THE CODE OF VIRGINIA SERVING SENTENCES WHICH ARE INDETERMINATE IN CHARACTER SHALL BE ELIGIBLE FOR RELEASE ON PAROLE FOLLOWING INITIAL STUDY, TESTING AND DIAGNOSIS. (19.2-313)

8. ONE-HALF OF THE CREDITS ALLOWED INMATES FOR GOOD CONDUCT MAY BE APPLIED TO REDUCE THE PERIOD OF TIME THEY MUST SERVE BEFORE BECOMING ELIGIBLE FOR PAROLE. (53.1-116; 53.1-191 THROUGH 53.1-197; 53.1-202)

B. PERSONS NOT ELIGIBLE FOR PAROLE

1. PERSONS SENTENCED TO DIE SHALL NOT BE ELIGIBLE FOR PAROLE. (53.1-151)

2. ANY PERSON CONVICTED OF THREE SEPARATE FELONY OFFENSES OF MURDER, RAPE, OR ROBBERY BY PRESENTING OF FIREARMS OR OTHER DEADLY WEAPON WHEN SUCH OFFENSES WERE NOT PART OF A COMMON ACT, TRANSACTION OR SCHEME

SHALL NOT BE ELIGIBLE FOR PAROLE. (53.1-151.B1)

ANY PERSON CONVICTED OF THREE SEPARATE FELONY OFFENSES OF MANUFACTURING, SELLING, GIVING, DISTRIBUTING OR POSSESSING WITH THE INTENT TO MANUFACTURE, SELL, GIVE OR DISTRIBUTE A CONTROLLED SUBSTANCE, WHEN SUCH OFFENSES WERE NOT PART OF A COMMON ACT, TRANSACTION OR SCHEME, AND WHO HAS BEEN AT LIBERTY AS DEFINED IN THIS SECTION BETWEEN EACH CONVICTION, SHALL NOT BE ELIGIBLE FOR PAROLE. (53.1-151.B2)

IN THE EVENT OF A DETERMINATION BY THE DEPARTMENT OF CORRECTIONS THAT AN INDIVIDUAL IS NOT ELIGIBLE FOR PAROLE UNDER 53.1-151.B1 THE PAROLE BOARD MAY IN ITS DISCRETION, REVIEW THAT DETERMINATION, AND MAKE A DETERMINATION FOR PAROLE ELIGIBILITY PURSUANT TO REGULATIONS PROMULGATED BY IT FOR THAT PURPOSE. ANY DETERMINATION OF THE PAROLE BOARD OF PAROLE ELIGIBILITY THEREBY SHALL SUPERSEDE ANY PRIOR DETERMINATION OF PAROLE INELIGIBILITY BY THE DEPARTMENT OF CORRECTIONS UNDER 53.1-151.B2.

3. A PERSON CONVICTED OF AN OFFENSE AND SENTENCED TO LIFE IMPRISONMENT AFTER BEING PAROLED FROM A PREVIOUS LIFE SENTENCE SHALL NOT BE ELIGIBLE FOR PAROLE. (53.1-151)

4. PERSONS SENTENCED TO DEATH WHOSE SENTENCES ARE LATER COMMUTED TO LIFE BY THE GOVERNOR ARE NOT ELIGIBLE FOR PAROLE. (OPINION OF THE ATTORNEY GENERAL ISSUED AUGUST 11, 1961)

5. FELONS CONVICTED OF AND SENTENCED FOR ESCAPE SHALL NOT BE ELIGIBLE FOR PAROLE DURING SERVICE OF THE ESCAPE SENTENCE IMPOSED. (53.1-203)

6. PERSONS SENTENCED TO LIFE IMPRISONMENT WHO ARE THEREAFTER CONVICTED BY A COURT OF LAW OF ESCAPE BECOME INELIGIBLE FOR PAROLE. (53.1-151)

7. PERSONS SENTENCED TO A FELONY OFFENSE(S) COMMITTED ON/AFTER JANUARY 1, 1995, SHALL NOT BE ELIGIBLE FOR PAROLE, EXCEPT GERIATRIC PRISONERS WHO ARE ELIGIBLE UNDER 53.1-40.01, AND SUCH REGULATION AS MAY BE PROMULGATED BY THE PAROLE BOARD.

No. 16-1177

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF VIRGINIA
AND RANDAL MATHENA, CHIEF WARDEN,
RED ONION STATE PRISON,

Petitioners,

v.

DENNIS LEBLANC,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED
(Rephrased)

In 1994, the Virginia legislature abolished parole; a life sentence became life imprisonment without parole. A decade and a half later, this Court decided *Graham v. Florida*, 560 U.S. 48 (2010), holding that nonhomicide juvenile offenders must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and may not be sentenced to life without the possibility of parole. *Id.* at 74, 75, 82. Following *Graham*, Dennis LeBlanc challenged his life-without-parole sentence for a nonhomicide offense when he was 16 years old, but the Virginia state courts determined he was not entitled to relief by relying on a rarely used provision designed to allow the release of elderly inmates who posed no threat to public safety because of their physical state. Below, the Fourth Circuit found that it was unreasonable for the Virginia courts to find that a geriatric provision of the Virginia code provides a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. Thus, the question before this Court is:

> Was it an unreasonable application of this Court's decision in *Graham v. Florida*, 560 U.S. 48 (2010), for the Virginia state courts to uphold a life-without-parole sentence for a juvenile nonhomicide offender?

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INTRODUCTION

In 2003, Dennis LeBlanc was sentenced to life imprisonment without parole for a nonhomicide offense that occurred when he was 16 years old. This sentence violates this Court's holding in *Graham v. Florida*, 560 U.S. 48 (2010), which banned life-without-parole sentences and required that juvenile nonhomicide offenders must be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75. Recognizing this violation, the Fourth Circuit Court of Appeals granted Mr. LeBlanc relief, remanding his case for resentencing "in accordance with *Graham* and the Eighth Amendment." *LeBlanc v. Mathena*, 841 F.3d 256, 274 (4th Cir. 2016). In *Graham*, this Court identified the Commonwealth of Virginia as one of the 11 states that sentenced children to life without the possibility of parole. 560 U.S. at 64, App.

The Commonwealth now claims that a statutory provision that preceded *Graham* by 15 years provides the opportunity required by *Graham*. The Fourth Circuit properly found, however, that the geriatric provision which, among other things, provides only the most remote opportunity for release akin to executive clemency, allows the Parole Board to deny release for any reason, and treats juvenile offenders worse than adult offenders, does not provide the opportunity *Graham* requires.

Specifically, the court below found the state court adjudication in this case to be an objectively unreasonable application of *Graham* because Mr. LeBlanc was a juvenile sentenced to life imprisonment without parole for a nonhomicide offense and because a general geriatric provision did not afford him with the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" demanded by *Graham* and did not account for juveniles' lesser culpability, in part by treating juvenile offenders *worse* than adults. *Id.* at 259–60, 267–68, 272.

This Court should deny certiorari and leave undisturbed the Fourth Circuit's holding decided squarely under the strictures of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). There is no legitimate "split" that is damaging to Virginia's judicial system, as suggested by the Commonwealth. Instead, Virginia wishes for exemption from compliance with this Court's constitutional commands. Dennis LeBlanc's life-without-parole sentence violates *Graham*, and the Fourth Circuit rightly held that the state courts' finding that it did not was objectively unreasonable.

STATEMENT OF THE CASE

On July 15, 2002, Dennis LeBlanc was found guilty of nonhomicide offenses that occurred on July 6, 1999, when he was 16 years old. Mr. LeBlanc was convicted during a one-day bench trial after he waived his right to a jury on the advice of counsel. On March 4, 2003, he was sentenced to two terms of life imprisonment. Mr. LeBlanc did not appeal his conviction and sentence. Because Mr. LeBlanc's crime occurred in 1999, he is ineligible for any form of parole on his life sentences.[1]

On May 17, 2010, this Court held in *Graham v. Florida*, 560 U.S. 48, 82 (2010), that it is unconstitutional to condemn a juvenile to life imprisonment for a nonhomicide offense. The *Graham* Court reasoned that because children under the age of eighteen lack maturity, are vulnerable to negative outside influences,

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[1]Virginia abolished parole for all people convicted of felonies after January 1, 1995. Va. Code Ann. § 53.1-165.1. Among those convicted before 1995, those sentenced to life imprisonment for the first time are eligible for parole after 15 years; those sentenced to two or more life sentences are eligible after 20 years. (4th-Cir.-JA 301.) After this first parole review, if parole is not granted, subsequent reviews occur annually; the board can extend this period, but to no longer than three years from the prior review. (4th-Cir.-JA 304.) Credit for good conduct may reduce the time an inmate must serve before becoming parole eligible. (4th-Cir.-JA-301.) As of June 2014, there were 4,656 people incarcerated in Virginia who were eligible for parole. Va. Dep't of Corr., *State Responsible Offender Population Trends FY2010-FY2014* 8 (July 2015), *available at* https://vadoc.virginia.gov/About/facts/research/new-statsum/offenderpopulationtrends_fy10-fy14.pdf.

and have characters that are not yet fully formed, they possess an inherently lessened culpability. *Id.* at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)). Therefore, the *Graham* Court established a categorical bar on life-imprisonment-without-parole sentences for children who do not commit homicide. *Id.* at 74, 82. In doing so, the Court explicitly recognized Virginia as a state that permitted this type of unconstitutional punishment. *Id.* at 63–64.

In light of *Graham*, Mr. LeBlanc filed a Motion to Vacate Invalid Sentence on May 11, 2011, in the Virginia Beach Circuit Court. (4th-Cir.-JA 112.) The state court denied him relief, relying on a recent Supreme Court of Virginia decision, *Angel v. Commonwealth*, 704 S.E.2d 386 (Va. 2011), to conclude that a statute related to geriatric inmates relieves Virginia of any responsibility to comply with Graham. (4th-Cir.-JA 157.) The geriatric provision relied on by *Angel* was enacted over 15 years before *Graham* was decided and allows for the conditional release of prisoners who are over the age of 60 and have served at least 10 years of their sentence. Va. Code Ann. § 53.01-40.01. The Virginia Criminal Sentencing Commission has explained that the rationale for the geriatric provision was to save the Department of Corrections money through a non-parole procedure where inmates can still be released if they are infirm or terminally ill and pose no threat to public safety because of their physical weakness. (4th-Cir.-JA 193–94.)

On November 9, 2011, Mr. LeBlanc filed a petition for appeal in the Supreme Court of Virginia. The court heard arguments in support of a writ on April 3, 2012, and issued an order refusing Mr. LeBlanc's petition for appeal on April 13, 2012. Mr. LeBlanc filed a petition for rehearing at the Supreme Court of Virginia on April 26, 2012, and the court denied rehearing on June 15, 2012.

Mr. LeBlanc filed his first and only habeas petition on June 19, 2012. On July 1, 2015, the district court issued an opinion, concluding that under the standard of review set out by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Mr. LeBlanc is entitled to habeas relief. *LeBlanc v. Mathena*, No. 2:12-cv-340, 2015 WL 4042175, at *9 (E.D. Va. July 1, 2015). The district court held that Mr. LeBlanc must be resentenced in accordance with *Graham* and that he "may not be sentenced to life without the possibility of parole for nonhomicide offenses he committed as a juvenile." *Id.* at *19.

The Commonwealth appealed to the United States Court of Appeals for the Fourth Circuit. On May 10, 2016, the Fourth Circuit affirmed the district court's decision and again remanded Mr. LeBlanc's case for resentencing. *LeBlanc v. Mathena*, 841 F.3d 256, 274 (4th Cir. 2016). The court found the state court adjudication to be an objectively unreasonable application of *Graham* because Mr. LeBlanc was a juvenile sentenced to life imprisonment without parole for a nonhomicide offense. The court found that the geriatric provision did not afford

Mr. LeBlanc with the "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," or account for juveniles' lesser culpability, as demanded by *Graham*. *Id.* at 259–60, 267–68. The court noted three "minimum requirements" a state's parole procedures must meet to comply with this Court's decision in *Graham*: "(1) that juvenile nonhomicide offenders sentenced to life imprisonment must have the 'opportunity to obtain release based on demonstrated maturity and rehabilitation,' (2) that this opportunity must be 'meaningful,' and (3) that the early release or parole system must take into account the lesser culpability of juvenile offenders." *Id.* at 267.

Regarding the first requirement, the court found the geriatric provision did not provide an opportunity to obtain release "based on demonstrated maturity and rehabilitation" because the geriatric provision procedures provide for an Initial Review stage at which the inmate must provide a "compelling reason" to receive review and the Board can deny review for *any reason*, thus providing no guarantee that maturity and rehabilitation will be considered. *Id.* at 270. The court found the geriatric provision further failed to comply with this requirement because it allows juveniles to die in prison "based solely on the heinousness or depravity of the offender's crime." *Id.* The court noted that in "*nearly every case*," Virginia has denied consideration under the geriatric provision based on the "serious nature of the crime," which directly contravenes *Graham*'s requirement

that a juvenile, because of the greater capacity for change than his adult counterparts, have the opportunity "to demonstrate that the bad acts he committed as a teenager are not representative of his true character." *Id.* at 270 (quoting *Graham*, 560 U.S. at 79).

The court found the geriatric provision also does not meet *Graham*'s second requirement, that the opportunity for release be "meaningful," for two reasons. First, in *Angel v. Commonwealth*, 704 S.E.2d 386 (2011), on which the state court entirely relied in denying Mr. LeBlanc relief, the Virginia Supreme Court expressed an *expectation* that a life sentence would mean a juvenile would spend the rest of his life in prison. *LeBlanc*, 841 F.3d at 270–71. Second, because the lack of any standards governing denial of geriatric petitions gives inmates only a "'bare possibility' of release," the mechanism does not constitute "'parole' for purposes of the Eighth Amendment." *Id.* at 271 (quoting *Solem v. Helm*, 463 U.S. 277, 301 (1983)). In so finding, the court cited to this Court's holding in *Graham* that executive clemency, with its similar lack of governing standards, does not constitute a "meaningful opportunity to obtain release." *Id.* at 271–72 (citing *Graham*, 560 U.S. at 69–70).

Finally, the court found that the geriatric provision does not meet *Graham*'s third requirement, that states take into account the lesser culpability of juvenile offenders. The court found that, even if Virginia authorities did not

exercise their prerogative to deny consideration under the geriatric provision at the Initial Review stage for any reason and went on to the Assessment Review stage, at which they would consider the "decision factors" used in a normal parole proceeding, "a prisoner's youth at the time of his offense is not among those factors." *Id.* at 272. Moreover, the court found that under the geriatric provision juvenile offenders are treated *worse* than adult offenders because they necessarily serve longer sentences, finding:

> Given that (1) the Supreme Court specifically held that sentencing systems that require juvenile offenders to serve more years and/or a greater percentage of their lives relative to adult offenders violate the Eighth Amendment's proportionality principle and that (2) Geriatric Release subjects juvenile offenders to longer—and proportionately longer—sentences, it was objectively unreasonable to conclude that Geriatric Release complied with *Graham*.

Id.

For these reasons, the Fourth Circuit held that the state court adjudication of Mr. LeBlanc's case was an objectively unreasonable application of *Graham* and ordered him to be resentenced in compliance with this Court's constitutional commands. *Id.* at 268, 274. The Commonwealth now petitions for certiorari.

REASONS TO DENY THE PETITION

I. Certiorari Should Be Denied Because Virginia Is a State that Imposes Life Without Parole on Juvenile Nonhomicide Offenders and the Fourth Circuit Properly Ruled that the Commonwealth's Geriatric Provision Does Not Satisfy the Requirements of *Graham*.

In *Graham v. Florida*, 560 U.S. 48 (2010), this Court held that it is a violation of the Eighth Amendment to sentence a child to life without parole for a nonhomicide offense committed before the child turned eighteen years old. *Id.* at 82. In *Graham*, the Court identified Virginia as one of the states where children are serving life-without-parole sentences for nonhomicide offenses. The Court stated, "there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and *Virginia*." *Id.* at 64 (emphasis added) (internal citations omitted); *see also id.* (citing Letter from Dr. Tama S. Celi, Virginia Department of Corrections, reporting that there were eight juvenile nonhomicide offenders serving life without parole in Virginia); *id.* at App. (listing Virginia in subsection entitled "Jurisdictions that Permit Life Without Parole Sentences for Juvenile Nonhomicide Offenders").

Virginia did nothing to bring its sentencing scheme into compliance with

Graham after the decision. Because Virginia's geriatric provision was enacted over 15 years before *Graham* was decided, it is not credible to suggest that the provision is a response to the decision or served to do so.[2] The Virginia Criminal Sentencing Commission has itself explained that the rationale for the geriatric provision was to save the Department of Corrections money through a non-parole procedure where inmates can still be released if they are infirm or terminally ill and pose no threat to public safety because of their physical weakness. (4th-Cir.-JA 193–94.) Virginia's geriatric provision is consistent with what a number of other states have done to address the costs associated with this growing population of elderly and infirm prisoners. This rising number of geriatric inmates created a corresponding increase in costs for departments of corrections, as expenses associated with incarcerating older prisoners are drastically higher. Nat'l Inst. of Corr., U.S. Dep't. of Justice, Accession No. 024200, *Special Challenges Facing Parole* 29–31 (Aug. 2011) [hereinafter "NIC"], *available at* https://s3.amazonaws.com/static.nicic.gov/Library/024200.pdf.

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[2]That the Virginia legislature did not conceptualize the provision as parole is evinced by the fact that it does not appear in the section of the Virginia Code that pertains to parole. As the district court found, "[p]rovisions governing parole are found in a chapter entitled 'Probation and Parole' in Virginia's statutory provisions. Va. Code Ann. § 53.1-151. The geriatric provision is contained in the chapter regarding 'State Correctional Facilities,' and in a subsection regarding the 'privileges' of prisoners. *See* Va. Code Ann. § 53.1-40.01." *LeBlanc v. Mathena*, No. 2:12-cv-340, 2015 WL 4042175, at *16 (E.D. Va. July 1, 2015).

Therefore, in an attempt to address the increase in costs required to care for this growing population, Virginia, along with at least 13 other states and the District of Columbia, have enacted statutes that provide a mechanism for elderly prisoners to apply for release based on illness or age-based infirmities.[3]

These statutes are not meant to provide an evaluation of an inmate's rehabilitation and potential for successfully reentering and becoming a contributing member of society, as required by *Graham*. Instead of a mechanism to review the appropriateness of a prisoner's sentence, these statutes are intended to alleviate budgetary concerns of state departments of corrections by releasing prisoners who are costly to the system. NIC at 29–31; (4th-Cir.-JA 193–94.)

In *Graham*, this Court rejected the idea that these types of laws are

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[3]Most of the states that have this type of provision either enacted the statute or amended their existing medical parole statute to include an age based provision in the 1990s and early 2000s, when the population of aging inmates began to grow rapidly. *See* Colo. Rev. Stat. § 17-1-102 (amended to included age-related provision in 2000); 2000 Colo. Sess. Laws Ch. 312; Conn. Gen. Stat. § 54-131k (enacted in 2004); D.C. Code § 24-465 (enacted in 1993); Miss. Code Ann. § 47-5-139 (amended to include age-related provision in 1995); 1995 Miss. Laws Ch. 596; Mo. Rev. Stat. § 217.250 (amended to include age-related provision in 1994); 1994 Mo. Laws S.B. 763; N.M. Stat. Ann. § 31-21-25.1 (enacted in 1994); Okla. Stat. tit. 57, § 332.7 (amended to include age-related provision in 1997); 1997 Okla. Sess. Laws Ch. 133; Ore. Rev. Stat. § 144.122(1)(c) (amended to include age-related provision in 1993); 1993 Ore. Laws Ch. 198; Tex. Gov't Code § 508.146 (enacted in 1997); Va. Code Ann. § 53.1-40.01 (enacted in 1994).

relevant to its conclusion that life-without-parole sentences for children convicted of nonhomicide offenses are unconstitutional. Under Florida's laws, Terrance Graham had a possibility of release both through the state's executive clemency procedures, Fla. Stat. § 940.01, and through Florida's conditional medical release program, which allows an inmate to be conditionally released due to an existing physical or medical condition, Fla. Stat. § 947.149; Fla. Admin. Code Ann. r. 23-24.020. Although Florida law provided for the remote possibility of medical release, the *Graham* Court ruled Florida was denying Mr. Graham "any chance to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child," *Graham*, 560 U.S. at 79, and that states must provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 75.

The Administrative Procedures governing the geriatric provision confirm that this provision is not parole. The Fourth Circuit noted "several key ways" in which it differs from Virginia's parole system. *LeBlanc*, 841 F.3d 256, 262 (4th Cir. 2016). In addition to the age restriction, an inmate must actively submit a petition which provides "compelling reasons" for consideration, whereas parole consideration is automatic; the Parole Board "may deny a petition for Geriatric Release at the Initial Review stage without considering any of the 'decision factors' enumerated in the Parole Board Policy Manual"; unlike those eligible for

parole, geriatric review applicants are not necessarily interviewed; and four members of the five-member Parole Board must vote to approve, as opposed to three for parole. *Id.* at 261–63.

In granting Mr. LeBlanc relief from his unconstitutional sentence, the Fourth Circuit properly recognized that it was unreasonable for the state courts to uphold Mr. LeBlanc's life-without-parole sentence by reasoning that the geriatric provision allows Virginia to meet the requirements of *Graham*. *Id.* at 268–72. Deference to a state court does not immunize the state court decision from habeas review. *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) ("[D]eference does not imply abandonment or abdication of judicial review . . . ." (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003))). As the Fourth Circuit noted, federal habeas relief for a state prisoner is warranted under the AEDPA when his state court adjudication either "'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' 28 U.S.C. § 2254(d)(1), or 'was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding,' *id.* § 2254(d)(2)." *LeBlanc*, 841 F.3d at 263. The Fourth Circuit properly found that the holding of *Graham* contained three minimum requirements: juvenile nonhomicide offenders must (1) have an opportunity to obtain release based on demonstrated maturity and

rehabilitation; (2) this opportunity must be meaningful; and (3) the parole system must account for the lesser culpability of juvenile offenders. *LeBlanc*, 841 F.3d at 264–67. It applied this clearly established federal law to the state court decisions below and held that the Virginia state courts' application of all three parts of this holding to Mr. LeBlanc's case was objectively unreasonable, warranting relief under 28 U.S.C. § 2254(d)(1).

We refrain from recounting here the Fourth Circuit's well-reasoned application of *Graham* to the state courts' decisions. It is necessary, however, to point out specific flaws in the Commonwealth's petition on these points. As a part of its holding that the geriatric provision fails to meet *Graham*'s first requirement—that of providing an "opportunity to obtain release based on demonstrated maturity and rehabilitation"—the Fourth Circuit noted that the Geriatric Release Administrative Procedures "allow the Parole Board to deny Geriatric Release for any reason at the Initial Review stage and therefore provide no guarantee that the Parole Board will consider a juvenile offender's maturation and rehabilitation—a question of federal constitutional law." *LeBlanc*, 841 F.3d at 270. Importantly, the state court decisions, the dissenting opinion at the Fourth Circuit, and the Commonwealth's petition fail to account for the procedures governing the Initial Review stage, nor do they explain why this process would be a suitable remedy under *Graham*.

Regarding the second requirement, that the opportunity be "meaningful," the court found in part that Mr. LeBlanc did not face the prospect of a "meaningful" opportunity when in *Angel v. Commonwealth*, 704 S.E.2d 386 (2011), on which the state court entirely relied in denying Mr. LeBlanc relief, the Virginia Supreme Court expressed an expectation that a life sentence would mean a juvenile would spend the rest of his life in prison. *Id.* at 270–71. In its petition to this Court, the Commonwealth does not directly challenge this assessment of *Angel*, which stated: "the effect of [the juvenile defendant's life] sentences is that [he] *will* spend the rest of his life confined in the penitentiary." 704 S.E.2d at 401 (as quoted by *LeBlanc*, 841 F.3d at 270–71). An *expectation* of death in prison cannot reasonably be read to comply with *Graham*'s requirement of a "meaningful opportunity to obtain release."

In its petition, the Commonwealth makes an unfounded assertion about *Graham*'s requirement of a "meaningful opportunity." The Commonwealth claims the Fourth Circuit "erred under AEDPA in concluding that a State's parole regulations are defective under *Graham* unless they make the consideration of 'maturity and rehabilitation' mandatory, rather than discretionary." Cert. Pet. at 24. It cites as error the Fourth Circuit's statement that "[f]or purposes of *Graham*, the key issue is not whether the Parole Board is '*able*' to consider a juvenile offender's rehabilitation and maturity—it is

whether the Parole Board *must* consider rehabilitation and maturation." *Id.* (quoting *LeBlanc*, 841 F.3d at 271 n.10 (first emphasis added by Commonwealth)). Yet this Court clearly stated in *Graham*: "What the State *must* do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham* 560 U.S. at 75 (emphasis added). In light of the clarity of *Graham*, the Commonwealth's assertions that "*Graham* simply did not address the mandatory/discretionary distinction," and that "even if such consideration were discretionary, it would not be 'an unreasonable application of' *Graham* under § 2254(d)(1) for a State court to conclude that such a system provided the parole opportunity that *Graham* requires," Cert. Pet. at 25, constitute a fundamental misapprehension of *Graham*'s basic holdings that only reinforces the Fourth Circuit's holding that the Commonwealth's procedures do not provide the meaningful opportunity required.

Finally, the Fourth Circuit found that the geriatric provision does not meet *Graham*'s third requirement, that states take into account the lesser culpability of juvenile offenders. Most notably, the court found that under the geriatric provision juvenile offenders are treated *worse* than adult offenders because they necessarily serve longer sentences, holding that because "the Supreme Court specifically held that sentencing systems that require juvenile offenders to serve

more years and/or a greater percentage of their lives relative to adult offenders violate the Eighth Amendment's proportionality principle" and that Virginia's geriatric provision "subjects juvenile offenders to longer—and proportionately longer—sentences," it was objectively unreasonable for the state courts to conclude that the geriatric provision complied with Graham. *LeBlanc*, 841 F.3d at 272.

As discussed further in Part II, *infra*, the Fourth Circuit did not, as the Commonwealth claims, "conclud[e] that *Graham* 'clearly established' that parole eligibility at age 60 must be considered a life-without-parole sentence." Cert. Pet. at 30. The Commonwealth's claim here, in fact, serves to highlight a decisive difference between the geriatric provision and parole. Parole statutes premise eligibility on a number of years, or percentage of sentence, *served*. Thus a 16-year-old and a 40-year-old, each serving life with the possibility of parole after, for example, 20 years, will have a chance after that specified amount of time to demonstrate rehabilitation, the 16-year-old at age 36, and the 40-year-old at age 60. Under the Commonwealth's geriatric provision, however, the 16-year-old must serve 44 years to the 40-year-old's 20 years. This element of the geriatric provision directly violates *Graham*'s requirement that states account for juveniles' diminished culpability and treat them accordingly. It is objectively unreasonable to believe that a state could account for juveniles' diminished

culpability by giving them objectively *more severe* punishments than adults, and the Fourth Circuit held accordingly.

II. Certiorari Should Be Denied Because the Petition Incorrectly Characterizes the State Court Decision and the Fourth Circuit's Opinion, Which Is Narrow and Limited in Application.

The Fourth Circuit's opinion is narrow and implicates only a small cohort of Virginia's juvenile nonhomicide offenders. To obtain review by this Court, the Commonwealth exaggerates and mischaracterizes the lower court ruling and this Court should deny review.

First, the Commonwealth inaccurately alleges that the Fourth Circuit held parole eligibility at age 60 is equivalent to life without parole and that parole must be probable in order to satisfy *Graham v. Florida*, 560 U.S. 48 (2010). Cert. Pet. at i, 28 ("[T]he Fourth Circuit was wrong to read *Graham* to foreclose a parole system that postpones eligibility until age 60."); *id.* at 26 ("[T]he panel erred in reading *Graham* to require that States ensure a *probability* of release . . . ."); *see also id.* at 28–30, 34–39. To the contrary, the Fourth Circuit held that the state court decision permitting Mr. LeBlanc's life-without-parole sentence was an objectively unreasonable application of this Court's holding in *Graham*. *Leblanc*, 841 F.3d 256, 260 (4th Cir. 2016) ("[I]t was objectively unreasonable for the state courts to conclude that geriatric release affords [Mr. LeBlanc] with the 'meaningful opportunity to obtain release based on demonstrated maturity and

rehabilitation' *Graham* demands." (quoting *Graham*, 560 U.S. at 75)). Further, notwithstanding the fact Virginia abolished parole and that the geriatric provision is not parole, *LeBlanc*, 841 F.3d at 260, the Fourth Circuit explicitly stated: "It is important to note that this case does not present the question of whether a lengthy term-of-years sentence for a juvenile is the functional equivalent of life without parole under *Graham*." *Id.* at 267 n.5. The Fourth Circuit also explicitly declined to address any possible age-related limitations in *Graham*'s holding. *Id.* at 266 n.3 ("We take no position on whether *Graham* established—clearly or otherwise—other minimum requirements for parole or early release programs for juvenile nonhomicide offenders sentenced to life imprisonment.").

Similarly, in asserting that the Fourth Circuit held that parole must be probable, Cert. Pet. at 26–27, the Commonwealth presents a misreading of the Fourth Circuit's opinion. *LeBlanc*, 841 F.3d at 266. The Commonwealth neither quotes nor cites any portion of the Fourth Circuit opinion, including the dissent, to point to such a holding. The Commonwealth attempts to push its unsupported position by claiming the Fourth Circuit created some right to parole, again failing to cite to any portion of the Fourth Circuit's opinion. *See* Cert. Pet. at 28. The Fourth Circuit found that *Graham* drew a line in requiring an opportunity for release to be "more than a 'remote possibility,'" *LeBlanc*, 841 F.3d at 266

(quoting *Graham*, 560 U.S. at 70), and, confusingly, the Commonwealth does not otherwise appear to disagree, *see* Cert. Pet. at 26 ("'A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.'" (quoting *Graham*, 560 U.S. at 82)).

As the Commonwealth presents a question not decided by the court below, this Court should deny review. *See Glover v. United States*, 531 U.S. 198, 205 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below."); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (finding question presented contained issue not decided in circuit court below so not properly before Supreme Court); *cf. Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511, 521 (2012) (where at oral argument party "tendered a different justification for . . . judgment, one not aired in the courts below, and barely hinted at" in its brief, Court confined review to "issue explored and decided" below). Otherwise, this Court would be deciding an issue without benefit of a well developed record with relevant arguments on both sides. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence also dictates awaiting a case in which the issue was fully litigated below, so that [this Court] will have

the benefit of developed arguments on both sides and lower court opinions squarely addressing the question.").

Second, for there to be a circuit split, the Fourth Circuit must have issued a decision on a matter that runs counter to the holdings of other circuits. *See* Sup. Ct. R. 10(a) ("entered a decision in conflict"). The Commonwealth claims that the Fourth Circuit's opinion conflicts with the Sixth and Ninth Circuits as well as the high courts of Nebraska and Louisiana. Cert. Pet. at 34–36. However, every opinion the Commonwealth cites concerns whether a particular sentence is equivalent to life without parole; none concerns a single geriatric provision like Virginia's. *See, e.g.*, *Demirdjian v. Gipson*, 832 F.3d 1060, 1076 (9th Cir. 2016) (considering whether *Miller v. Alabama*, 567 U.S. 460 (2012), applied to two consecutive sentences of 25 years to life); *Starks v. Easterling*, 659 F. App'x 277, 278 (6th Cir. 2016) (unpublished) (considering whether *Miller* applied to sentence of life plus consecutive 11-year sentence with parole eligibility after 62 years); *State v. Smith*, 295 Neb. 957, 959, 971 (Neb. 2017) (considering sentence of 90 years to life with parole eligibility); *State v. Brown*, 118 So. 3d 332, 335 (La. 2013) (considering one life sentence, plus four 10-year sentences, with parole eligibility). The Fourth Circuit issued no holding on whether a term-of-years sentence is equivalent to life without parole, *LeBlanc*, 841 F.3d at 267 n.5, because Mr. LeBlanc is sentenced to life without parole.

Thus, the Fourth Circuit did not create a circuit split.

Third, the petition is due to be denied because the Commonwealth is incorrect in arguing that *Angel v. Commonwealth*, 704 S.E.2d 386 (2011), offered an interpretation of state law in upholding a life-without-parole sentence for a juvenile nonhomicide offender. *See, e.g.*, Cert. Pet. at 14 ("Virginia Supreme Court's interpretation"). The *Angel* Court merely quoted the statute, though not the procedures, then glossed over their plain text and structure in holding:

> The regulations for conditional release under this statute provide that *if the prisoner meets the qualifications for consideration contained in the statute*, the factors used in the normal parole consideration process apply to conditional release decisions under this statute. While this statute has an age qualifier, it provides, as the Commonwealth argues, the 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' required by the Eighth Amendment.

Angel, 704 S.E.2d at 402 (emphasis added). The Fourth Circuit found that the plain language of the geriatric review procedures draws a clear distinction between the Initial Review stage, where a request for consideration can be denied for any reason, and the Assessment Review stage, the second stage where parole factors can be considered. *Leblanc v. Mathena*, 841 F.3d at 261, 269–70 ("[T]he Procedures allow the Parole Board to deny Geriatric Release for any reason at the Initial Review stage and therefore provide no guarantee that the Parole Board will consider a juvenile offender's maturation and rehabilitation—a

question of federal constitutional law."). As the Commonwealth admits, the *Angel* Court "drew no such distinction." Cert. Pet. at 14.

To the extent anything about the provision or regulation is unclear, the *Angel* Court offered no clarification or limiting construction, contrary to the Commonwealth's assertion.[4] Cert. Pet. at 19–21 (arguing "the Fourth Circuit's decision improperly intruded on the prerogative of the Supreme Court of Virginia to provide a limiting construction"). For example, the Court in *Angel* does not mention or clarify what constitutes a "compelling reason," required under the geriatric procedures to pass beyond the Initial Review stage. *LeBlanc*, 841 F.3d at 261. The Fourth Circuit was obligated under section 2254 to examine the state law decision in *Angel* and consider arguments on both sides because no reasoning was put forward by the *Angel* Court. *See Harrington v. Richter*, 562 U.S. 86, 102 (2011) ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision . . . ."). Upon doing so, the Fourth Circuit found it was unreasonable to conclude Mr. LeBlanc, sentenced to life without parole, had a meaningful opportunity for release based on demonstrated maturity and

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[4]The Fourth Circuit only mentions "unsettled" state law once, in order to demonstrate that the dissenting opinion's interpretation of *Angel* conflicts with the plain language of the procedures. *LeBlanc*, 841 F.3d at 269. Thus, the Commonwealth's repeated insistence that a question should have been certified to the Virginia Supreme Court, Cert. Pet. at 21–23, is inapposite.

rehabilitation. *LeBlanc*, 841 F.3d at 269.

Lastly, review should be denied because this case implicates the application of this Court's precedent to a single state statute and a related regulation, affecting only a narrow cohort of juvenile nonhomicide offenders in Virginia. In addition to incorrectly claiming this case involves the "validity of Virginia's parole regulations," Cert. Pet. at i, the Commonwealth attempts to provoke review with declarations of intolerable disruptions because 21 juvenile nonhomicide offenders, Cert. Pet. at 32, out of the nearly 30,000 people incarcerated in Virginia, Va. Dep't of Corr., *Monthly Population Summary February 2017* 1 (2017), *available at* https://vadoc.virginia.gov/About/facts/research/new-popsum/2017/feb17popsummary.pdf, may seek habeas review of their life-without-parole sentences.[5] For comparison, when *Graham* was decided, 16 years after the passage of Virginia's geriatric provision, there were at least eight juveniles in Virginia, and 77 in Florida, that the Court counted when determining how many juveniles fell under *Graham*'s purview. 560 U.S. at 63–64.

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[5]The Commonwealth tries to pad the statistics by identifying people "serving aggregate sentences of 40 years or longer," Cert. Pet. at 32, who would be affected under its mistaken view of the Fourth Circuit's holdings. Because the Fourth Circuit explicitly did not decide whether a term of years was equivalent to life without parole, *LeBlanc*, 841 F.3d at 267 n.5, these individuals do not have sentences implicated by the Fourth Circuit's opinion.

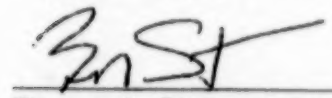
Thus, the Commonwealth vastly overstates and mischaracterizes this case, involving one statute and its applicability to 21 juvenile nonhomicide offenders in Virginia. The Fourth Circuit has not invalidated Virginia's parole regulations, has not ruled on the equivalence of a term of years to life without parole, and has not ruled that parole must be probable. Given the narrow holding and relevance of the Fourth Circuit's opinion, which the Commonwealth is unable to accurately contrast with the opinions of any other circuit court, and the opinion's limited impact, certiorari is not warranted and should be denied.

CONCLUSION

The Fourth Circuit properly found that the state court decision permitting a sentence of life without parole in Mr. LeBlanc's case was an unreasonable application of *Graham* because Mr. LeBlanc lacked a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation and Virginia's geriatric provision did not account for juveniles' lesser culpability. Additionally, review should be denied because the Commonwealth mischaracterized the lower court opinion, which concerns a single statute and single related regulation and which affects an exceedingly small cohort of Virginia inmates. Further, the Commonwealth seeks review of questions not litigated or decided in the court below, and seeks to create and embellish a circuit split predicated on a holding that was not reached in this case. Therefore, the Petition for Writ of Certiorari

should be denied.

Respectfully submitted,



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RECORD AND BRIEFS

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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA AND
RANDALL MATHENA, CHIEF WARDEN,
RED ONION STATE PRISON,

Petitioners,

v.

DENNIS LEBLANC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

REPLY BRIEF IN SUPPORT OF CERTIORARI

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No. 16-1177

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA AND
RANDALL MATHENA, CHIEF WARDEN,
RED ONION STATE PRISON, PETITIONERS,

V.

DENNIS LEBLANC, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

INTRODUCTION

It is simply untrue that LeBlanc "is ineligible for any form of parole on his life sentences." Br. in Opp. 3. As the Virginia Supreme Court made clear in *Angel*, juvenile offenders like LeBlanc are eligible for conditional release at age 60 based on "normal parole consideration[s]" under Virginia Code § 53.1-40.01.[1] The parole manual identifies conditional release as a form

[1] *Angel v. Commonwealth*, 704 S.E.2d 386, 402 (Va. 2011).

of parole.[2] And even after the contrary decision below, the Virginia Supreme Court reaffirmed *Angel*, stating that Virginia's geriatric-release system "provides a meaningful opportunity for release that is akin to parole."[3] LeBlanc's insistence that he is ineligible for "any form of parole" is purely semantic. While it is true that Virginia abolished traditional parole for offenses committed after 1994, Pet. 7 n.10, offenders like LeBlanc are eligible for conditional release at age 60 based on the same considerations as in traditional parole. And Virginia's highest court has now twice found that there is no material difference between those two forms of parole with regard to providing a juvenile nonhomicide offender serving a life term with, as *Graham* put it, "some realistic opportunity to obtain release before the end of that term."[4]

Because this case arises on federal habeas, not direct review, the question is not whether *Angel* was correct that Virginia's conditional-release regulations satisfy *Graham*. This Court has twice declined direct review of that question. Pet. 32 & nn.117-18. Rather, the question under AEDPA is whether the Virginia courts were "'objectively unreasonable, not merely wrong; even clear error will not suffice.'"[5] To be objectively unreasonable, the State court's decision must be "'so lacking in justification that there was an error

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[2] App. 161a (II.B.7).

[3] *Johnson v. Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016).

[4] *Graham v. Florida*, 560 U.S. 48, 82 (2010).

[5] *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) (quoting *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014)).

well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'"[6]

LeBlanc did not come close to satisfying that "high bar."[7] To conclude otherwise, the Fourth Circuit first had to reject the Virginia Supreme Court's binding interpretation of Virginia's parole regulations, contrary to settled habeas law. It then had to extend *Graham* far beyond its limited holding. Both steps were wrong and plainly violate AEDPA.

ARGUMENT

I. The Fourth Circuit violated AEDPA's deferential-review standard in finding Virginia's system invalid under *Graham*.

A. The Fourth Circuit improperly rejected the Virginia Supreme Court's binding State-law determination that Virginia's conditional-release system applies normal parole considerations.

The Fourth Circuit erred by reading Virginia's parole regulations differently from the Virginia Supreme Court in *Angel*. The regulations state that: "All factors in the parole consideration process . . . shall apply in the determination of Conditional Release."[8] *Angel* expressly rejected a *Graham* challenge because "[t]he

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[6] *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

[7] *Id.*

[8] App. 144a.

regulations for conditional release under this statute provide that if the prisoner meets the qualifications for consideration contained in the statute, the factors used in the normal parole consideration process apply to conditional release decisions under this statute."[9] To be sure, the Fourth Circuit disagreed with that reading of the regulations. Because the sentence on which *Angel* relied occurred in the paragraph under the heading for "Assessment Review," rather than under the heading for "Initial Review," the Fourth Circuit inferred that "the Parole Board may deny a petition for Geriatric Release *for any reason*—without consideration of the 'decision factors'—at the Initial Review stage."[10] But that was merely the Fourth Circuit's inference, not what the regulations actually say. And the court simply failed to credit *Angel*'s contrary reading that drew no distinction between the two stages.

LeBlanc criticizes *Angel* and Virginia for failing "to account" for the difference between the two stages of review, Br. in Opp. 14, but Virginia has steadfastly maintained that *Angel* compels consideration of normal parole factors at *both* stages, including those factors that plainly cover the offender's youth at the time of the offense and his maturity and rehabilitation while incarcerated. Pet. 25. It is LeBlanc and the Fourth Circuit that have failed to account for the Virginia Supreme Court's authoritative interpretation of the Virginia regulations.

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[9] 704 S.E.2d at 402.

[10] App. 24a.

It was reversible error to reject the Virginia Supreme Court's construction. This Court made clear in *Bradshaw* that "a state court's interpretation of state law . . . binds a federal court sitting in habeas corpus."[11] And *Estelle* took pains to "reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."[12] Although Judge Niemeyer pointed out in dissent that Virginia's high court is "the ultimate authority on Virginia law,"[13] the majority did not listen. If the Fourth Circuit had a question about what it called an "unsettled issue of State law," the proper course was to certify it to the Supreme Court of Virginia. Pet. 21-23. Choosing instead to override the State court's contrary holding in *Angel* was a classic violation of *Bradshaw* and *Estelle*, cases that LeBlanc fails to mention.

The Fourth Circuit compounded that mistake by erroneously interpreting the parole regulations to exclude the consideration of an offender's youth at the time of the offense.[14] Judge Niemeyer showed the majority's interpretation to be an incorrect reading of the parole manual, which prescribes factors that obviously cover the offender's youth, as well as his maturity and rehabilitation while incarcerated. Pet. 23-24. LeBlanc effectively concedes that the Fourth

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[11] *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005).

[12] *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

[13] App. 47a.

[14] App. 31a.

Circuit erred on that point by failing to defend it in his opposition.

LeBlanc cannot show that Virginia's conditional-release program violates *Graham* by claiming that its original purpose was "to save the Department of Corrections money" by releasing infirm prisoners, rather than providing release for juvenile offenders who have successfully reformed in prison. Br. in Opp. 10.[15] For one thing, even assuming that was the motivating factor, it dovetails with releasing reformed juvenile offenders when they become eligible. For another, LeBlanc himself introduced into evidence the statement of the Chair of the Virginia Parole Board, who explained that the geriatric-release program was "really focused on people who were going to get very long sentences at a young age *so they would have some opportunity to be released.*"[16] That statement—which LeBlanc now ignores—is fully consistent with using the conditional-release program to comply with *Graham.* And whatever the original motivation, *Angel* clarified

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[15] LeBlanc's authority for ascribing such motive to Virginia does not come from any legislative history, but from a Powerpoint slide presented by the Deputy Director of the Virginia Sentencing Commission at a 2010 conference in Maine. 4th-Cir.-JA 180. The slide stated as "Rationale for Geriatric Release" that "Research shows that, as offenders age, they are less likely to recidivate[.] Some inmates, by virtue of their age and physical condition, are unlikely to pose a threat to public safety[.] Moreover, cost to the Department of Corrections, particularly in medical expenses, is significantly higher for older inmates[.]" 4th-Cir.-JA 193-94.

[16] 4th-Cir.-JA 344 (emphasis added).

that normal parole considerations apply to geriatric-release determinations. LeBlanc cannot discredit that authoritative State-law determination by denigrating the program's origins.

B. LeBlanc wrongly claims that *Graham* already decided this case.

LeBlanc argues that *Graham* effectively decided this case based on two arguments that were not even mentioned in the Fourth Circuit's opinion. Both claims lack merit.

First, LeBlanc argues, Br. in Opp. 1, 4, 9, that this Court already branded Virginia as a life-without-parole jurisdiction when *Graham* said that "[o]ur research shows" that Virginia had incarcerated eight "juvenile nonhomicide offenders serving life without parole sentences," and when *Graham* included Virginia in an appendix listing jurisdictions that permitted life without parole for such offenders.[17] But this Court has repeatedly "explained that '"clearly established Federal law" for purposes of § 2254(d)(1) includes *only the holdings, as opposed to the dicta*, of this Court's decisions.'"[18]

Because Virginia's juvenile sentencing system was not at issue in *Graham* nor part of the Court's holding,

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[17] 560 U.S. at 63, 84.

[18] *Woods*, 135 S. Ct. at 1376 (quoting *White*, 134 S. Ct. at 1702) (emphasis added).

the references to Virginia were plainly dicta that cannot support a finding that Virginia's courts unreasonably applied *Graham*'s holding. In any case, when the opinion in *Graham* cited Virginia's system, it overlooked Virginia's conditional-release statute.[19] And *Angel* determined post-*Graham* that juvenile nonhomicide offenders *are* eligible for release based on normal parole considerations when they turn 60. Accordingly, *Graham*'s comments about Virginia are not controlling and did not prevent the Virginia Supreme Court from reaching a different conclusion.

Second, LeBlanc claims that Virginia's conditional-release statute is similar to Florida's medical-release statute, Fla. Stat. § 947.149, and that because this Court found that Florida had imposed a life-without-parole sentence on Graham, Virginia's statute must also be deemed noncompliant. Br. in Opp. 11-12. But *Graham* did not even mention Florida's medical-release statute. So there is not even dictum in *Graham* on which to hang LeBlanc's argument. And unlike Virginia—which has consistently maintained that juvenile offenders like LeBlanc are eligible for release based on normal parole considerations at age 60—Florida *defended* the life-without-parole sentence it imposed in *Graham*.[20] LeBlanc also neglects to mention

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[19] 560 U.S. at 84 (omitting Va. Code Ann. § 53.1-40.01).

[20] Br. of Resp't at 58 n.38, *Graham v. Florida*, 560 U.S. 48 (2010) (No. 08-7412). *Cf. Miller v. Alabama*, 132 S. Ct. 2455, 2462 n.2 (2012) (noting that Arkansas claimed for the first time on appeal that its system did not impose a mandatory life-without-parole sentence, "[b]ut Arkansas never raised that objection in the

that Florida's medical-release statute applies only to a "[p]ermanently incapacitated inmate" or a "[t]erminally ill inmate."[21] The Florida statute therefore is not comparable to Virginia's conditional-release program, which has no such limitations.

This Court has emphasized that in applying AEDPA, "if the circumstances of a case are only 'similar to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases."[22] *Graham* did not address what type of parole would provide "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[23] To the contrary, the Court said "[i]t is for the State, in the first instance, to explore the means and mechanisms for compliance."[24] And the deference afforded State courts under AEDPA is even broader when, as here, "the 'precise contours' of [a] right remain 'unclear.' "[25] Indeed, as the Ninth Circuit noted in *Demirdjian*, this Court's 2003 decision in *Lockyer v. Andrade* already demonstrated that a life-without-parole sentence is "materially distinguishable" for AEDPA purposes from the

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state courts, and they treated Jackson's sentence as mandatory. We abide by that interpretation of state law.").

[21] Fla. Stat. § 947.149(1).

[22] *Woods*, 135 S. Ct. at 1377.

[23] 560 U.S. at 75.

[24] *Id.*

[25] *Woods*, 135 S. Ct. at 1377 (quoting *White*, 134 S. Ct. at 1705).

50-year aggregate sentence—with parole eligibility at age 87—at issue in *Lockyer*.[26]

Providing eligibility for conditional-release at age 60 based on normal parole considerations is likewise "materially distinguishable" under AEDPA from a system that imposes life without parole. Because *Graham* did not "confront 'the specific question presented by this case,' the state court's decision could not be 'contrary to' any holding from this Court."[27]

C. The Fourth Circuit wrongly interpreted *Graham* to require a probability of release and to reject an age-60 threshold.

The Fourth Circuit doubled down on its *Estelle-Bradshaw* error when the court based its decision on two novel interpretations of *Graham* that plainly extended *Graham*'s holding, also in violation of AEDPA.

First, contrary to LeBlanc's characterization, Br. in Opp. 19, the Fourth Circuit interpreted *Graham* to require that a State parole system ensure early release in the "vast majority of cases," and the court then found Virginia's system wanting for not meeting that expectation. The Fourth Circuit clearly stated:

> But under clearly established Supreme Court precedent—precedent repeatedly relied on by

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[26] *Demirdjian v. Gipson*, 832 F.3d 1060, 1077 (9th Cir. 2016) (discussing *Lockyer v. Andrade*, 538 U.S. 63, 73-74, 79 (2003)).

[27] *Woods*, 135 S. Ct. at 1377 (quoting *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam)).

> *Graham*, *id.* at 70—"parole" should be the "normal expectation in the vast majority of cases," *Solem [v. Helm]*, 463 U.S. [277], 300-03 [(1983)]. It was objectively unreasonable, therefore, for the Supreme Court of Virginia to take the position that a penal regime under which it concedes early release is the exception, rather than the expectation, complies with *Graham*'s meaningfulness requirement.[28]

We accurately characterized that gloss on *Graham* as requiring that a parole system ensure a *probability* of release. For the Fourth Circuit just said in that block quote that a parole system violates *Graham* if "early release is the exception, rather than the expectation."

That is a breathtaking expansion of *Graham* that finds no support in its dicta, let alone its holding. A probability-of-release requirement is in tension with *Graham*'s assurance that "[a] State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime."[29] And it contradicts the representation of Graham's counsel to Chief Justice Roberts that a parole system resulting in 1 in 20 juvenile offenders obtaining release would be constitutionally sufficient. Pet. 27. Indeed, LeBlanc implicitly recognizes that a probability-of-release requirement is not supported by *Graham* because he insists that the Fourth Circuit did not say what it plainly said.

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[28] App. 29a.

[29] 560 U.S. at 75.

Notably, LeBlanc does not dispute the magistrate judge's conclusion that the geriatric-release statistics likely *understate* the true chances of release for juvenile offenders in LeBlanc's situation. But even taking those statistics at face value, they showed that 5.8% of the offenders who applied for geriatric release received it, more than the 1 in 20 that Graham's counsel conceded would pass constitutional muster. *See* Pet. 12, 27.

Second, LeBlanc tries to recast the Fourth Circuit's rejection of the age-60 threshold for conditional release. It is not so much a rejection of age 60, he suggests, but that juvenile offenders must serve longer to reach that age than adult offenders, something he claims violates *Graham*'s premise that juveniles must be treated differently. Br. in Opp. 16-17.

But *Graham* provides no support for rejecting a State-parole system on the ground that a juvenile offender might serve a longer sentence in a particular case than a person who committed the same crime as an adult. Pet. 29-30. Judge Niemeyer correctly observed in dissent that that rationale would vitiate any term-of-years sentence imposed on a juvenile because "a young person's chances of serving a full sentence are inherently higher than an older person's."[30] As this Court said in *White*, "[s]ection 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent; it does not require

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[30] App. 58a.

state courts to *extend* that precedent or license federal courts to treat the failure to do so as error."[31]

II. The Fourth Circuit has created a split over whether parole eligibility at age 60 negates a life-without-parole sentence.

Graham's prohibition of life-without-parole sentences for juvenile nonhomicide offenders cannot apply if parole eligibility at age 60 converts it into a life-*with*-parole sentence. LeBlanc does not dispute that federal and State courts have consistently held that the opportunity for parole at age 60 (or even later) means that it is *not* a life-without-parole sentence. Pet. 34-36 (collecting cases). The South Dakota Supreme Court recently joined that long list, holding that a 92-year sentence with parole eligibility at age 60 was not life without parole.[32]

Certiorari is warranted because the Fourth Circuit departed from that rule. It now stands alone in concluding that parole eligibility for juvenile nonhomicide offenders at age 60 nonetheless violates the Eighth Amendment. Extending *Graham* that far in a case governed by AEDPA was plain error.

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[31] *White*, 134 S. Ct. at 1706.

[32] *State v. Charles*, No. 27691, 2017 WL 1199763, at ¶ 10, 2017 S.D. LEXIS 32, at *7-8 (¶ 10) (S.D. Mar. 29, 2017).

III. The split creates intractable problems for Virginia's criminal-justice system and warrants summary reversal.

LeBlanc is wrong to minimize the disruption to Virginia by saying that the ruling below affects only 21 juvenile offenders serving life sentences. Another 75 offenders serving aggregate sentences of 40 years or longer can also invoke *LeBlanc*, even though this Court has not yet decided if *Graham* applies to aggregate-sentence cases. Pet. 32-33. Indeed, one federal habeas judge recently ordered resentencing of a juvenile offender serving an aggregate 77-year sentence; the judge found conditional release at age 60 inadequate because, "as noted by the Fourth Circuit in *LeBlanc*, there is *no guarantee* that [the juvenile's] petition for early release will ever be granted."[33] That judge's understanding that *LeBlanc* now requires a "guarantee" of early release shows the serious mischief that the decision will continue to spawn unless corrected.

What is more, LeBlanc ignores that in new cases involving Virginia's most serious juvenile offenders, State judges will confront the dilemma that a lengthy sentence that is valid under *Angel*, with parole eligibility at age 60, may well be deemed invalid under *LeBlanc*. The only way to steer clear of *LeBlanc* would be to impose a sentence shorter than "life without parole."

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[33] *Contreras v. Commonwealth*, No. 1:13cv772, 2017 WL 372330, at *5 (E.D. Va. Jan. 26, 2017) (emphasis added), *appeal docketed*, No. 17-6307 (4th Cir. Mar. 9, 2017).

But how long is that? This Court has provided no guidance to determine when a lengthy term-of-years sentence amounts to a life sentence.

Thus, the decision below not only splits with authorities nationwide, but it seriously disrupts Virginia's criminal-justice system. Summary reversal is warranted before the errors planted in *LeBlanc* spread their invasive roots any further.

CONCLUSION

This Court should grant the petition for writ of certiorari and then summarily reverse the judgment of the Fourth Circuit.

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